

Thesis for Degree of Doctor of Philosophy

A Proposal for Harmonisation of Security of
Payment Legislation in the Australian
Building and Construction Industry

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Abstract

Over the past twelve years, building and construction industry security of payment legislation has progressively come into force in all the Australian States and Territories. A primary objective of the legislation is to ensure that parties in the industry receive timely and fair payment for construction work carried out and/or related goods and services supplied. In order to achieve this objective, the legislation has focused on removing unfair contractual payment provisions, establishing a default right to progress payments in the absence of such contractual provision, and providing a swift, interim method of dispute resolution for payment claims in the form of an adjudication scheme. As such, a party who claims it is owed money under a construction contract can refer its payment claim to an independent adjudicator for a rapid determination of the amount (if any) due. Such a determination has binding effect, pending any eventual outcome from a more formal dispute resolution process such as litigation or arbitration.

There is a lack of uniformity between the various Australian Acts. Many commentators distinguish two broad Australian legislative models, with key differences as to the scope of disputes covered, and the payment provisions and adjudication schemes prescribed. These inconsistencies have resulted in extra costs to the construction industry due to the unfamiliarity, uncertainty and confusion with security of payment laws and procedures in the various jurisdictions. Furthermore, the cost to the public purse of administering the legislation is exacerbated by the need to educate stakeholders about eight different regimes.

The time is ripe for action to be taken to harmonise the legislation. Accordingly, this thesis proposes a legislative approach which is appropriate for adoption on a nationally uniform basis. The proposed approach is informed by a review, on the available evidence, of the performance of the Australian schemes, and an evaluation of the schemes by reference to a set of criteria drawn from the dispute resolution literature.

Declaration

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Publications

Parts of this thesis have been published, or are pending publication, in the following peer reviewed articles

Coggins, J.K., Fenwick Elliott, R., and Bell, M. (2010), 'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia', *Australasian Journal of Construction Economics & Building*, 10(3), 14-35.

Coggins, J.K. (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 & Building*, 11(2), 34-59.

Coggins, J.K. (2011), 'Dispute Resolution in the Australian Construction Industry – Is there hope for Arbitration?', *Building and Construction Law*, 27, 292-304.

Coggins, J.K., and Donohoe, S. (2012), 'A Comparative Review of International Construction Industry Payment Legislation, and Observations from the Australian Experience', *International Construction Law Review*, 29(2), 195.

Coggins, J.K., and Donohoe, S. (2012), 'The Validity of Adjudicators' Determinations containing Errors of Law – a Comparison of Judicial Approaches in England and New South Wales', *International Journal of Law in the Built Environment*, pending publication in 4(2).

Table of Abbreviations/Terms and Definitions

Abbreviation/Term	Definition for this Thesis
ABIC MW-1 2003	Australian Building Industry Contract: ABIC MW-1 2003 Major Works Contract
ABS	Australian Bureau of Statistics
ACA	Australian Constructors Association
ACT Act	<i>Building and Construction Industry Security of Payment Act 2009 (ACT)</i>
ADR	Alternative Dispute Resolution
ANA	Authorised nominating authority
APCC	Australian Procurement and Construction Council
AS 2124–1992	AS 2124–1992 Australian Standard General Conditions of Contract
AS 2545–1993	AS 2545–1993 Australian Standard Subcontract Conditions
AS 4000–1997	AS 4000–1997 Australian Standard General Conditions of Contract
AS 4300–1995	AS 4300–1995 Australian Standard General Conditions of Contract for Design and Construct
AS 4303–1995	AS 4303–1995 General Conditions of Subcontract for Design and Construct
AS 4901–1998	AS 4901– 1998 Australian Standard Subcontract Conditions
AS 4902–2000	AS 4902–2000 Australian Standard General Conditions of Contract for Design and Construct
DAP	Dispute Avoidance Process
DB	Dispute Board
DRB	Dispute review board
DSD	Dispute System Design
East Coast model legislation	Security of payment legislation in NSW, Victoria, Queensland, ACT, SA and Tasmania
IAMA	Institute of Arbitrators and Mediators Australia
NSW Act	<i>Building and Construction Industry Security of Payment Act 1999 (NSW)</i>
NT Act	<i>Construction Contracts (Security of Payments) Act (NT)</i>
NZ Act	<i>Construction Contracts Act 2002 (NZ)</i>
PC-1	Project Contract PC-1, Property Council of Australia

QBCIPA	Queensland Building and Construction Industry Payments Agency
QBSA	Queensland Building Services Authority
Queensland Act	<i>Building and Construction Industry Payments Act 2004 (Qld)</i>
Queensland Regulations	<i>Building and Construction Industry Payments Regulation 2004 (Qld)</i>
SA Act	<i>Building and Construction Industry Security of Payment Act 2009 (SA)</i>
Singapore Act	<i>Building and Construction Industry Security of Payment Act 2004 (Singapore)</i>
Tasmanian Act	<i>Building and Construction Industry Security of Payment Act 2009 (Tas)</i>
UK Act	Part II of <i>The Housing Grants, Construction and Regeneration Act 1996</i>
Victorian Act	<i>Building and Construction Industry Security of Payment Act 2002 (Vic)</i>
WA Act	<i>Construction Contracts Act 2004 (WA)</i>
West Coast model legislation	Security of payment legislation in WA and NT

Chapter 1

Introduction

Over the past sixteen years, fourteen Commonwealth jurisdictions¹ have enacted legislation primarily aimed at ensuring that building contractors receive timely and fair progress payments for contractual obligations carried out.² In order to achieve this, such legislation has focussed on removing unfair contract payment provisions and providing a swift, interim method of dispute resolution in the form of statutory adjudication. The catalyst for the introduction of such payment legislation in the building and construction industry has been the predominance of cash flow problems experienced particularly by small specialised trade contractors who often work as subcontractors to larger building contractors. Such cash flow problems occur directly as a result of failure to pay, or late and/or unfairly devalued, progress payments by principals in contractual arrangements. This threatens the profitability and financial survival of contractors in the industry, as well as the capability of contractors to pay their own subcontractors.

Whilst cash flow problems afflict all industries to some extent, the building and construction industry is particularly susceptible due to a combination of four factors which interact to intensify the problem. Firstly, the existence of multi-layered hierarchical subcontracting chains which characterise construction projects means that payment problems at any one level in the contracting chain will affect all contractors below by virtue of a ‘domino’ or ‘ripple’ effect. Secondly, the risky financial environment of the construction industry means that firms are often doing business in a climate where tight profit margins, undercapitalised firms and unethical payment practices are all too common. Thirdly, the inclusion of unfair payment provisions in construction contracts, particularly in those contracts used to engage smaller contractors and suppliers. And, fourthly, the traditional dispute resolution methods of litigation and arbitration available to contractors experiencing payment problems have proven too costly and time consuming for most trade contractors to even contemplate with their limited resources.

¹ Commonwealth jurisdictions being those jurisdictions which share a common law legal tradition originally adopted from the United Kingdom.

² These jurisdictions being England and Wales, Scotland, Northern Ireland, New South Wales, Victoria, New Zealand, Queensland, Isle of Man, Western Australia, Singapore, Northern Territory, Tasmania, Australian Capital Territory and South Australia.

Of the fourteen jurisdictions which have enacted security of payment legislation for the building and construction industry, eight have been Australian States or Territories. The first Australian jurisdiction to enact such legislation was New South Wales (NSW) in the form of the *Building and Construction Industry Security of Payment Act 1999*. All the other Australian States and Territories have progressively followed NSW in enacting security of payment legislation,³ culminating in the Tasmanian Act which received royal assent on 17 December 2009.

The uptake of security of payment legislation by Australian States and Territories is consistent with the finding of the Honourable Royal Commissioner Terence Cole (2003: Vol 1, 6), in the *Final Report of the Royal Commission into the Building and Construction Industry* (the ‘Cole Report’), that there is an ‘absence of adequate security of payment for subcontractors.’ Such an uptake, however, is not consistent with Cole’s (2003: Vol 8, 115) recommendation that, due to reasons of equality and cost efficiency, the Commonwealth should enact building and construction industry security of payment legislation. Cole (2003: Vol 8, Appendix 1) even went as far as drafting a proposed *Commonwealth Building and Construction Industry Security of Payments Bill 2003*.

The consequence of security of payment legislation having, to date, emerged in Australia on a State-by-State basis is a lack of uniformity between the relevant Acts in the different Australian jurisdictions. Of the enacted Australian legislation, there are some very significant differences between, on one hand, the NSW, Queensland, Victorian, Tasmanian, Australian Capital Territory (ACT) and South Australian (SA) Acts and, on the other hand, the Western Australian (WA) and Northern Territory (NT) Acts.⁴ The NSW, Queensland, Victorian, Tasmanian, ACT and SA Acts have collectively been referred to as the ‘East Coast model’ legislation, and the WA and NT Acts as the ‘West Coast model’ legislation.⁵ The differences between the two models are particularly marked with respect to progress payment and adjudication provisions.

³ Ie, in order of enactment (earliest to latest): Victoria, Queensland, Western Australia, Northern Territory, South Australia, Australian Capital Territory and Tasmania.

⁴ As observed by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [46].

⁵ Although this terminology is no longer accurate from a geographical standpoint, its use was initially adopted at a time when only the NSW, Victorian, Queensland, WA and NT Acts had been enacted (Bell and

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The current situation with respect to security of payment legislation in Australia is not dissimilar to the one that used to exist with respect to inconsistencies in commercial arbitration State legislation, another key statute for the Australian construction industry concerning dispute resolution, until the mid-1980s when the States agreed to introduce uniform amendments so as to maintain consistency of the law and processes (Bailey 1998: 40).

The existence of two distinct statutory models, as well as some variations between Acts of the same model,⁶ presents inconsistency on a national basis resulting in unfamiliarity with security of payment legislation for interstate operators in the Australian construction industry. As a consequence of this unfamiliarity, interstate operators incur additional expense in attempting to familiarise themselves with the differences between the various Acts. As Cole (2003: Vol 8, 255) states, ‘National consistency in this area [ie, security of payment] is important because it reduces the cost of businesses moving between jurisdictions and operating in different jurisdictions.’

Furthermore differences between both the Acts themselves and judicial interpretation of the Acts from State to State create uncertainty and confusion for interstate operators with respect to their statutory payment rights and obligations. This, in turn, may affect their compliance with the relevant legislation. Jacobs (2010: 16) observes that:

It must be a matter of considerable confusion to practitioners advising clients who have projects in more than one State/ Territory where there is so little uniformity in the comparative legislation ... The sooner there is uniform legislation in a relatively small country such as Australia, the better for the construction industry.

Presently, with the NSW Act having been in operation for over a decade and with the legislation having now been enacted in every Australian State and Territory, there appears to be universal consensus that the time is right for harmonisation of the legislation. As Coggins, Fenwick Elliott and Bell (2010: 20) state:

Vella 2010: 566). See, for example, the report prepared for the Tasmanian Government by Stenning and Associates (2006); Xenophon (2007) in his Second Reading Speech for the first version of the Bill for the SA Act.

⁶ Particularly between the Victorian Act and the other East Coast model Acts.

Few in the industry would seriously advocate that the present, disjointed situation ought to continue; rather, there have been increasing calls – echoing those of the Cole Royal Commission nearly a decade ago – to forge a uniform national approach to security of payment regulation.⁷

It is contended that the need for an appropriate uniform model is highlighted all the more by the fact that the East Coast model legislation, which has been enacted in the majority of Australian jurisdictions including its three most populous States, has received staunch criticism from several quarters. The Editor of the Building and Construction Law Journal (2005: 327), for example, states:

It ill behoves those responsible for the Building and Construction Industry Security of Payment Act 1999 (NSW) to feel aggrieved about its consequences in the eyes of the law.

This journal is neither the first nor the last to point to the manifold and manifest shortcomings in the legislation ...

With due respect to those responsible for the New South Wales legislation, there is room for improvement – a lot of room.

On the bases that the current state of the legislation presents a problem to the Australian building and construction industry, as outlined above, and that the time is now right for action to be taken to harmonise the legislation, this thesis aims to establish the conceptual details of a legislative model which is the most appropriate for uptake in Australia on a nationally uniform basis.

Statutory adjudication is a form of alternative dispute resolution (ADR), albeit interim in nature, particular to the construction industry. The field of dispute resolution, however, extends far beyond the boundaries of both the construction industry and legal profession and is, by nature, interdisciplinary. There are several issues, lessons and observations emerging from the interdisciplinary context which are pertinent to the consideration of any one particular, industry-specific form of dispute resolution. As such, a proper evaluation of the statutory adjudication models in the Australian construction industry needs to be grounded in, and informed by, a review of the relevant literature from the wider multi-discipline dispute resolution field. Accordingly, as a starting point for this thesis, Chapter

⁷ Citing Bailey (2009), Zhang (2009), Bell and Vella (2010).

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2 reviews the substantial body of dispute resolution literature relating to ADR processes, dispute resolution systems and issues of justice in dispute resolution.

Chapter 3 focuses in on the traditional and alternative methods of dispute resolution used in the building and construction industry. The existing dispute resolution landscape of the Australian building and construction industry is reviewed. This assists in forming an understanding as to why the introduction of a new form of dispute resolution into the building and construction industry was deemed necessary by Australian Parliaments to specifically deal with payment disputes.

Chapter 4 attempts to define the security of payment problem, and explains the reasons why the problem has become endemic, in the building and construction industry. This is an important step, as identifying the nature, scope and the root of the mischief is fundamental to understanding parliamentary objectives in enacting security of payment legislation.

Having gained an understanding of the security of payment problem, Chapter 5 reviews the various options available to tackle it. This includes a consideration of existing and potential security of payment measures of a legislative and non-legislative nature. A thorough analysis of the options enables an insight to be gained into their limitations, and the consequent perceived need to enact security of payment legislation.

In order to understand the origins and influences shaping the Australian East and West Coast models, Chapter 6 begins by discussing the evolution of security of payment legislation in Australia in the context of similar legislation in other Commonwealth jurisdictions. The chapter progresses to compare the key substantive and procedural legislative differences between the two existing Australian models. An exploration of the relevant statutory provisions giving rise to these differences serves as a necessary preliminary to a subsequent critical review of the legislative models in operation. The chapter also considers the key differences between the Australian models and the United Kingdom, New Zealand and Singapore Acts in order to ensure that any proposed unified Australian legislative model be fully informed by the international legislation.

Chapter 7 considers the performance of the statutory adjudication schemes in Australia from the limited data which is available. After initially considering the extent and nature of use of statutory adjudication in the Australian jurisdictions, the chapter progresses to evaluate the schemes according to key dispute resolution evaluation criteria identified in Chapter 2, namely: efficiency, user satisfaction, effect on relationship and stability of outcome.

Chapter 8 considers the case for a national, harmonising approach to security of payment legislation, and how this may best be achieved within the framework of the *Australian Constitution*. Additionally, the various proposals and recommendations that have been proffered to date for a nationally unified legislative approach are considered.

Drawing upon the research undertaken in the previous chapters, Chapter 9 concludes by recommending a clear way forward to achieve national security of payment reform and, in so doing, sets out the conceptual details of a proposed unifying scheme appropriate for enactment at a Commonwealth level.

Chapter 2

ADR and Dispute Resolution Systems

2.1 The Interdisciplinary Nature of Dispute Resolution

Mandatory adjudication of payment disputes in the construction industry is but one of numerous examples of the adoption of Alternative Dispute Resolution (ADR) in the contemporary commercial environment. Indeed, the emergence of the contemporary ADR movement in the mid-1970s, its subsequent proliferation and the development of dispute management systems by organisations in the late 1980s and early 1990s have been, and continue to be, the subject of examination by scholars from many different disciplines, including law, psychology and sociology.

According to Moffitt and Bordone (2005: 5-8), interdisciplinary work on dispute resolution:

- has provided more and better tools, frameworks, and language for describing disputes;
- has increased the quantity and quality of prescriptive strategies for dealing with disputes; and
- presents important opportunities and tools for assessing how various dispute resolution approaches are working.

As such, any valid discussion as to the use of a specific dispute resolution process in a particular industry needs to be informed by this interdisciplinary literature. After considering the reasons for the emergence of ADR, therefore, this chapter provides, from an interdisciplinary perspective, an overview of the literature with respect to:

- the evolution of ADR systems into a focus on dispute systems design;
- justice, or fairness, in dispute resolution systems;
- evaluation of dispute resolution systems; and
- the repeat player effect in dispute resolution.

Some of the key dispute resolution literature from the fields of organisational sociology and social psychology is reviewed in order to set the foundation for subsequent discussion in this thesis (see Chapters 7 and 9) as to whether the various forms of statutory adjudication enacted in the construction industry provide an appropriate form of dispute resolution for the industry's payment disputes.

2.2 The Rise of ADR

A dispute has been defined as beginning when one person (or organisation) makes a claim or demand on another who rejects it, and the resolution of a dispute has been defined as the turning of opposed positions – the claim and its rejection – into a single outcome (Ury, Brett and Goldberg 1988: 4). ADR has become increasingly used by private individuals, organisations and courts to resolve disputes more efficiently than court litigation. The term ADR is used to refer to 'any method of dispute resolution other than formal adjudication such as court litigation or administrative proceedings' (Constantino and Sickles Merchant 1996: 33). The use of ADR may be freely agreed to by the parties, imposed by one more dominant party on the other by means of a contractual provision, or required by legislation.

ADR processes are not usually confined by the legal rules that govern court proceedings such as those regarding discovery, admissibility of evidence and the examination of witnesses (Lipsky, Seeber and Fincher 2003: 77-78). Indeed, ADR processes are distinguished from court proceedings by, amongst other things, allowing the parties significantly more control over the dispute resolution procedure⁸ and, generally, more freedom to select the neutral who will help resolve their dispute,⁹ so they are likely to have more trust and confidence in that person's ability to hear their case than a court appointed judge (Lipsky, Seeber and Fincher 2003: 77-78).

⁸ Although, depending on the ADR process, this power may not be equally distributed between the parties.

⁹ Although, the extent of this freedom will differ depending on the ADR process.

Although contemporary growth in the modern ADR movement emerged in the United States¹⁰ around the mid 1970s¹¹ as a reaction to the growing dissatisfaction with the court system (Lipsky, Seeber and Fincher 2003: xv & 75), ADR has existed in various forms for hundreds of years (Born 2009: 27). Boule (2011: 60) notes that:

Despite the depiction of litigation as the ‘normal’ dispute resolution process in developed Western societies there had in reality been long traditions of informal, business and community-based dispute resolution in these countries before ADR’s emergence in those settings in the 1970s and 1980s.

For example, ADR in Australia began in industrial relations long before the arrival of the modern ADR movement.¹²

ADR has since been embraced, to varying degrees, by numerous institutions and industries¹³ as part of their conflict management strategies. The legal profession has also established organisations to promote and facilitate the use of ADR methods.¹⁴ Additionally, as Condliffe (2008: 106-107) notes, many universities and law schools now offer ADR and mediation courses.

The relatively rapid rise of ADR since the early 1980s may be directly attributed to shortcomings with the court system, and the consequential search by disputants for a more efficient means of resolving conflict. Litigation has been much criticised for being too time-consuming, too costly, unable to address all stakeholders’ concerns, detrimental to the maintenance of the parties’ relationship, and unable to produce sustainable outcomes acceptable to both disputing parties (Lipsky, Seeber and Fincher 2003: 6; Constantino and

¹⁰ Moffitt and Bordone (2005: 19) note that Harvard Law Professor Frank Sander’s vision of a ‘multidoor’ courthouse in which not all cases would proceed to litigation (Sander 1976) is often credited as being ‘the Big Bang’ of modern dispute resolution theory and practice.

¹¹ Similar growth in the modern ADR movement in Australia followed shortly afterwards in the early 1980s. Condliffe (2008: 106) identifies the government-funded Community Justice Centres Pilot in 1980 (NSW) as the initial impetus for the development of what we now recognise as a new movement that became ‘ADR’ in Australia. See Condliffe (2008: 107) for a list of key developments in Australian ADR.

¹² Condliffe (2008: 35) notes that the ADR movement in Australia draws heavily upon its history of collective dispute management, especially in the industrial relations system.

¹³ Including, for example: water, employment, diamond, cotton, health, construction and securities.

¹⁴ The two leading organizations in Australia are: LEADR (originally Lawyers Engaged in ADR, now known as Leading Edge ADR), formed in 1989, and the Institute of Arbitrators and Mediators (IAMA), founded in 1975.

Sickles Merchant 1996: 35-37; Van Veen, Kreutzwiser and de Loë 2003: 90). As such, Condliffe (2008: 111) states:

the development of these new [ADR] initiatives during the last three decades has occurred against a backdrop of widespread concern, both in the community and the legal profession, about the Australian justice system.

2.2.1 The Shortcomings of Litigation

Litigation has traditionally proved to be a lengthy and unsatisfactory dispute resolution process for commercial disputes. The requirements of the formal litigation procedure are inherently time consuming and, consequently, expensive. Costs of litigation are both direct, in the form of legal fees, and indirect, in the form of the opportunity cost of the litigants' resources devoted to the litigation process.

The bulk of legal fees is directly proportionate to the amount of lawyers' time required during litigation in preparing pleadings, dealing with applications for interlocutory orders, discovering documents, preparing and responding to interrogatories, taking depositions, the procurement of expert reports, and preparing for, and attending, trial (Spigelman 2007: 10-11; Byrne 2007: 403). As well as being inherently time consuming, many of these activities may be subject to delay.

With respect to discovery of documents, the Honourable Chief Justice James Spigelman (2007: 11) states:

In significant commercial litigation full scale discovery can now cost multiples of millions of dollars. These expenditures are quite often disproportionate to the amount in dispute. This is an ongoing problem. It is now exacerbated by the fact that, for most Australian commerce, information is now kept entirely in electronic rather than documentary form.

Further, it is common for each of the parties to commercial litigation to commission extensive expert reports which overlap, thereby wasting costs through duplication.

The duration of litigation has also been exacerbated by overloaded court dockets, leading to long listing delays,¹⁵ lengthy trial hearings, multiple attendances at court and interlocutory applications during trial. In 2009, for example, the listing delay for the civil lists of the NSW Supreme Court's Common Law Division was 3 months (Supreme Court of NSW 2009: 61).

As the Honourable Justice David Byrne (2007: 398) observed, 'litigants despair at the burdens which are imposed upon them, unendurable delays, painful demands of their personnel and, of course, crippling costs.'

There has been a strong recognition from the judiciary in recent years in both England and Australia that the cost and time of litigation present a significant problem. In 1997 the then Chief Justice of the High Court of Australia, Sir Gerard Brennan (1996: 139), went as far as to state that, 'It is not an overstatement to say that the system of administering justice is in crisis.' In more recent times, Byrne (2007: 402-404) observes that:¹⁶

Litigation has traditionally been expensive, probably expensive beyond the reach of ordinary persons, and it has been slower than the commercial community might prefer. But the present cost of conducting this litigation in any but the largest cases will rarely be justified on a commercial basis.

... the amount of time, energy and cost which is invested in the venture [ie, litigation] should bear a relationship to the amount which is in issue and to the prospect of success.

Consequently, he warned that, 'if the courts do not provide a satisfactory forum for this [dispute] resolution, the disputants will look elsewhere' (Byrne 2007: 405).

The problems in the court system have been widely acknowledged by governments throughout Australia, as evidenced by the commissioning and publication of several pertinent government reports since the early 1990s. These include reports of the Senate Standing Committee on Legal and Constitutional Affairs (1993), the Access to Justice

¹⁵ This is the time between the establishment of readiness for hearing and the first group of available hearing dates that the Court offers for trial (Supreme Court of NSW 2009: 61).

¹⁶ A view shared one decade earlier by Brennan (1996: 139) who stated that 'litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally-aided litigant.'

Advisory Committee (1994), the Australian Law Reform Commission (ALRC) (1995; 1997; 2000) and the Victorian Law Reform Commission (VLRC) (2008).

Recommendations from these reports have led to significant improvements in the time and cost of litigation over the years. Such recommendations have included, amongst other things:

- the use of information technology in case management (ALRC 2000: ss 6.3-6.19; VLRC 2008: 324-335);
- the continual improvement of the individual docket system¹⁷ for case management (ALRC 2000: ss 7.4-7.24; VLRC 2008: 292-296);
- procedural flexibility in respect of discovery (ALRC 2000: ss 6.67-6.73; VLRC 2008: 426-480); and
- the improvement of court-annexed ADR (ALRC 2000: ss 6.59-6.66; VLRC 2008: 212-284).

Despite these improvements, however, the duration of the litigation process generally remains lengthy. For example, in 2009, the median finalisation time¹⁸ for cases on the Technology and Construction list in the NSW Supreme Court's Equity Division was 9.5 months (Supreme Court of NSW 2009: 60).

The inability of litigation to provide a viable means of dispute resolution for many parties has meant that the use of both court-annexed¹⁹ and private ADR methods is now recognised as an indispensable feature of dispute resolution. As the Honourable Chief Justice Murray Gleeson (2007: 10-11) notes:

Both within and outside the court system, there is increased emphasis on various forms of alternative dispute resolution. Arbitration has long been an important alternative to litigation, and

¹⁷ The general principle underlying the individual docket system is that each case commenced in court is to be randomly allocated to a judge of the court, who is then responsible for managing the case until final disposition (Federal Court of Australia 2009).

¹⁸ The median finalisation time refers to the time between commencement and disposal for cases finalised during the year.

¹⁹ In 2007/08, for example, 238 cases in the Supreme Court of WA's General Division were settled using court annexed mediation, saving a total of 1009.5 trial days (Supreme Court of WA 2008: 22).

has certain advantages, especially as a form of resolution of commercial disputes. Other procedures, such as mediation, conciliation, and early neutral evaluation are also widely used. The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them. Most legal disputes never come before courts; and most court cases are resolved by agreement between the parties rather than judicial decision. The formal and informal procedures that facilitate such agreements are an essential part of the system.

2.2.2 The Advantages of ADR

Due to its flexibility and relative informality of procedure, ADR has the great advantage of being a faster, cheaper and more efficient means of resolving disputes than litigation. Consequently, ADR may provide opportunities for claimants, whose access to litigation is financially restricted, to have their disputes heard and resolved. It also provides commercial parties with an opportunity to manage the potentially crippling overheads associated with dispute resolution by litigation.

As such, corporations, especially in the United States, initially saw the use of ADR principally as a strategy of controlling the costs of disputes. This subsequently led to a significant shift in the resolution of disputes from the court system to private forums, representing the *de facto* privatisation of the justice system (Lipsky, Seeber and Fincher 2003: xv-xvi).

In addition to its time and cost advantages over litigation, ADR has been credited with a range of procedural advantages. These include greater user choice, the potential for fairer outcomes, non-confrontational processes, the ability of participants to be ‘heard’ and to participate in developing outcomes, user ownership and control of the process, confidentiality, and avoidance of publicity (Condliffe 2008: 113; Constantino and Sickles Merchant 1996: 35-37). Furthermore, there appears to be broad consensus that ADR is more likely to produce outcomes with which the disputing parties are willing to comply (Constantino and Sickles Merchant 1996: 36-37; Lipsky Seeber and Fincher 2003: 78).

2.3 Categories of ADR

Constantino and Sickles Merchant (1996: 37-41) identified six broad categories of ADR.²⁰ These techniques range from those that are least invasive and allow the parties most control over the process and outcome (eg, negotiation), to those that are most invasive and allow the disputants the least control over the process and outcome (eg, binding arbitration). Examples of ADR techniques in each of the six categories are shown in Figure 2.1. The categories are as follows:

- preventive methods, which channel disagreements into a problem-solving arena early enough that escalation into full-blown disputes can often be avoided;
- negotiated methods, in which the disputants reach their own resolution, unaided by a third-party neutral or decision maker;
- facilitated methods, involving a third-party neutral with no decision making authority assisting the disputants to reach a satisfactory resolution;
- fact-finding methods, which utilise a third party or technical expert to make findings (usually on factual issues) and may be binding or non-binding;
- advisory methods, in which a third-party neutral (usually selected by the parties) reviews certain aspects of the dispute and renders an advisory opinion as to the likely outcome; and
- imposed methods, in which a third-party neutral makes a binding decision regarding the merits of the dispute.

The relative levels of autonomy which the disputants possess over process and outcome for each of the six categories are shown in Figure 2.1, in which each clockwise movement in the figures represents an incremental decrease in autonomy.

²⁰ Also, see Condliffe (2008: 293), who identified five similar categories of ADR options: preventative, collaborative, facilitative, advisory/fact-finding, and mandatory.

ADR and Dispute Resolution Systems

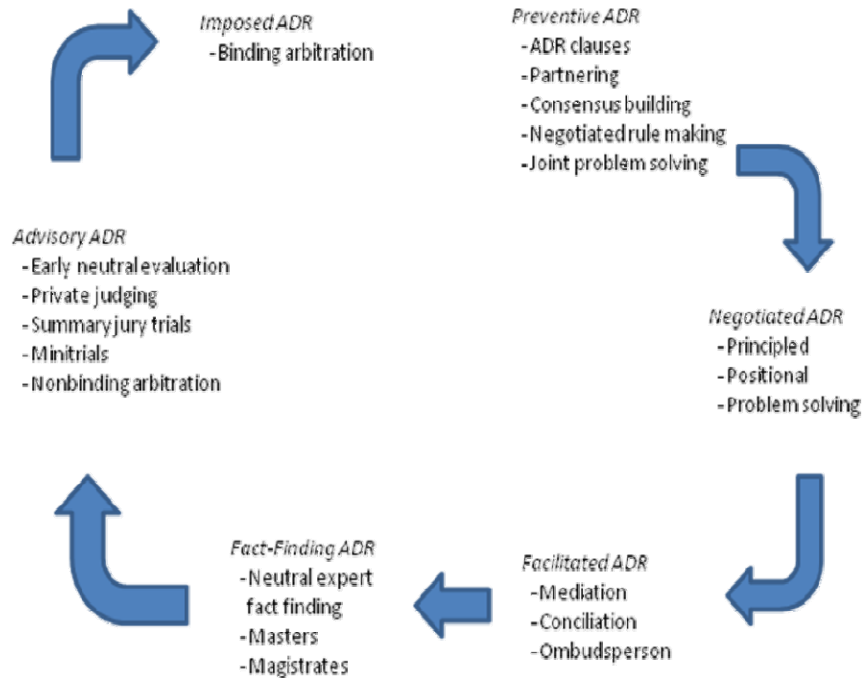


Figure 2.1 – Dynamics of ADR Techniques
(Source: Constantino and Sickles Merchant 1996: 38)

Condliffe (2008: 295) identifies four aspects to disputants' autonomy – level of intervention, focus of control, emphasis of approach, and source of solution – which are shown on a sliding scale against categories of ADR options in Figure 2.2.

NOTE:
This figure is included on page 15 of the print copy of
the thesis held in the University of Adelaide Library.

Figure 2.2 – Different Aspects of Intervention
(Source: Condliffe 2008: 295)

Procedural preference literature shows that when initial attempts to resolve a dispute fail, parties in dispute situations often utilise a number of dispute resolution techniques in an attempt to find something that will work. This progression of dispute resolution techniques

typically involves a movement from low cost, less formal approaches, such as negotiation and mediation, to higher cost, more formal processes, such as arbitration and litigation (Peirce, Pruitt and Czaja 1993: 200; Keating et al 1994: 144-145). This sequence entails erosion of stakeholder control and an increased risk of unfavourable settlements as disputants proceed toward litigation.

Selection of the most suitable ADR technique for a particular dispute is often critical to the dispute's successful resolution. Indeed, Constantino and Sickles Merchant (1996: 41) suggest that in designing and improving conflict management systems, the idea of ADR as *alternative* dispute resolution is perhaps less useful than the concept of ADR as *appropriate* dispute resolution. In other words, there must be a fit between the process and the problem. As such, ADR may fail where, for example, an imposed method of ADR has been used when perhaps a facilitated method would have been more appropriate or congruent with an organisation's mission, culture, or disputes. For this reason, Constantino and Sickles Merchant (1996: 41) emphasise it is important that dispute resolution practitioners be familiar with the entire spectrum of ADR options, so that they can accurately advise disputants and stakeholders as they design conflict management, or dispute resolution, systems together.²¹

2.4 The Emergence of Dispute Systems Design

By the late 1980s, literature began to emerge on the introduction of ADR programs into organisations with the objective of creating effective dispute resolution systems for managing employee concerns (Gadlin 2005: 374). Shortly afterwards, in the early 1990s, systems for managing organisational conflict emerged from the infusion of ADR with the principles of organisational development as a method for resolving intractable or frequent conflicts in troubled organisations, businesses, or entire industries (Gadlin 2005: 371). Lipsky, Seeber and Fincher (2003: xvii) describe this evolution in the organisational use of ADR as follows:

when organisations begin to use ADR, they tend to go forward rather than back. They move beyond the procedures and techniques of ADR and toward the use of a system. They begin their journey by

²¹ See further Sander and Rozdeiczer (2005).

attempting to manage litigation, then expand their concern to the management of disputes, and ultimately reach the point of systematically managing conflict.

The term ‘dispute systems design’ (DSD), which arose from the seminal work of Ury, Brett and Goldberg (1988: 42),²² refers to an organisation’s conscious effort to channel disputes into an effective dispute resolution system, ie a series of steps or options to manage conflict.

Wolski (1998: 12) describes DSD as follows:

Dispute systems design (DSD) involves the design and implementation of a dispute resolution system, that is, a series of procedures for handling disputes, rather than an individual procedure. A system operates as a series of safety nets. If one procedure fails to resolve a dispute, another procedure is waiting.

Bingham et al (2009: 3) observe that organisational DSDs can take myriad forms, ranging from multi-step procedures culminating in mediation and arbitration to simply a single step binding arbitration design. Condliffe (2008: 290) describes DSD as ‘thought out processes that provide fairness, certainty and timely responsiveness to managing conflict rather than ad hoc responses.’

According to Gadlin (2005: 375), the evolution of organisational DSD made enormous sense as not only do organisations have an impressive capacity to generate and nurture conflicts and enmity, but also because traditional formal procedures in place for addressing organisational conflict are slow and debilitating for the parties who use them. Furthermore, the disputing parties must continue to interact and work together in the organisation even while they are set against each other in a dispute resolution process, awaiting a decision on their dispute.

²² Their pioneering work was done at the Caney Creek Coal Mine (USA) where, due to an ineffectual dispute resolution system, even minor grievances resulted in a power struggle between management and employees. Consequently, the mine had been plagued by wildcat strikes in the 1970s.

There are now growing numbers of workplace DSD programs, particularly in the United States, in settings from federal, state, and local governments to a variety of private and non-profit organisations (Bingham et al 2009: 3).

2.5 Ury, Brett and Goldberg’s model for a Dispute Resolution System

Ury, Brett and Goldberg (1988: 22) present a model of a dispute resolution system, which is shown in Figure 2.3. The central feature of a dispute resolution system is the procedures used for resolving disputes. The input is disputes. The outputs are the costs and benefits to the organisation, the level of satisfaction of the disputants with the system, and the frequency with which disputes recur.²³ Four main factors directly affect the procedures in use: the procedures available, the parties’ motivations, the parties’ skills and the resource levels available. The dispute resolution system serves an organisation or relationship, which in turn exists in a larger social, economic, and cultural environment, all of which indirectly affect the procedures used.

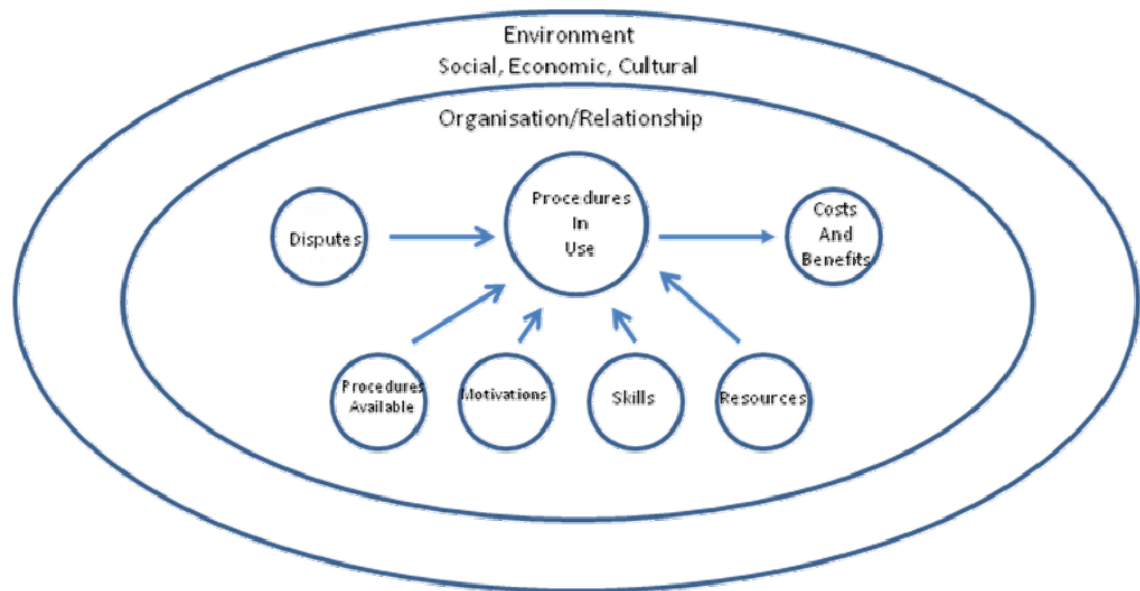


Figure 2.3 – Model of a Dispute Resolution System
(Source: Ury, Brett and Goldberg 1988: 22)

²³ These outputs are discussed in more detail below (see Chapter 2.8) when considering the evaluation of dispute resolution systems.

It is important to make sure the procedures work by providing the motivation to use them, the relevant skills, and the necessary resources.²⁴

Factors affecting disputants' motivation to use the procedures include: how satisfied the disputants are with the outcomes of the procedure; the opportunities which the procedure provides for 'voice' and for the venting of emotions such as anger and frustration; the participation of disputants in shaping the outcome; and the perceived cost of the procedure to the disputants in terms of time and money (Ury, Brett and Goldberg 1988: 33-34).

The skills which disputants need to effectively use the procedures include knowledge as to what procedures are available and when, what they are expected to do in the procedures, and how to use the procedures to generate a satisfactory outcome (Ury, Brett and Goldberg 1988: 35-36).

Resources required for procedures to operate effectively include suitably skilled people to serve as neutrals (eg, mediators or arbitrators), who are perceived as fair and unbiased by the disputants (Ury, Brett and Goldberg 1988: 37).

2.6 Approaches to Resolving Disputes in DSD

Ury, Brett and Goldberg (1988: Chapter 1) identify three primary ways of resolving disputes: by negotiating and reconciling interests of the parties, by determining who is right, and by determining who is more powerful.

They commence from the position that in a dispute people have certain interests at stake. Interests are needs, desires, fears – the things one cares about or wants – which underlie people's positions in a dispute.²⁵ Condliffe (2008: 292-293) defines interests as those

²⁴ Ury, Brett and Goldberg (1988: 64) give the example of one state legislature in the USA which, to deal with disputes over the location of hazardous waste treatment facilities, made negotiation mandatory and provided resources in the form of technical assistance to aid the negotiation process.

²⁵ Wolski (1998: 14) explains that: 'Interests are of three broad types: substantive, procedural, and psychological. Substantive interests are the needs that a person has for particular tangible objects such as money and assets. Procedural interests refer to the preferences that a party has for the way in which differences are discussed and the manner in which the bargaining outcome is implemented. Psychological interests are the emotional needs of a party, such as the need for respect.'

things that motivate people, the *why*, as distinct from positions which are the concrete expressions of those motivations.²⁶

Reconciling interests is not easy and involves probing for deep seated concerns, devising creative solutions, and making trade-offs and concessions where interests are opposed. Commonly negotiation and mediation are used in an attempt to reconcile interests. Before disputants can effectively begin the process of reconciling interests, they may need to vent their emotions. Expressing underlying emotions can be instrumental in negotiating a resolution as it reduces hostility, which is a barrier to interests-based negotiation, and might lead to the underlying issues being identified more surely.

Disputes which are resolved based upon who is 'right' depend upon some independent standard with perceived legitimacy or fairness to determine who is right, for example legal rights or socially accepted standards of behaviour. Rights, however, are rarely clear, and reaching agreement on rights, where the outcome will determine who gets what, can often be exceedingly difficult. This frequently leads to the parties turning to a third party to determine who is 'right', for example in the form of litigation or arbitration.

Disputes resolved on the basis of power occur when one more dominant party has the ability to coerce the other party to do something he or she would not otherwise do. Typically this means imposing costs on the other side or threatening to do so, for example by loss of revenue or damage to the reputation of an employer through a strike of the workforce. Exercise of power takes two common forms: acts of aggression (physical attack, sabotage); and withholding the benefits that derive from a relationship (eg, employees withholding labour in a strike).

Interest, rights and power are inter-related. The reconciliation of interests takes place within the context of the parties' rights and power. The likely outcome of a dispute if taken to court or to strike, for instance, helps define the bargaining range within which an interests-based resolution can be found.

²⁶ Although Provis (1996) contends that such definitions of interests and positions are ambiguous and, as such, identifies several different elements of the notions of both interests and positions.

Ury, Brett and Goldberg (1988: 10-19) advocate that the structuring of dispute resolution systems around the satisfaction of interests, as opposed to rights or power, results in a more effective approach to resolving the problems underlying a dispute.²⁷ They argued that an interest-based approach would generally be more likely to reduce the costs of conflict,²⁸ and to disarm the catastrophic impact of conflict on an organisation by improving relationships between disputants, and increasing the organisation's productivity and performance.

Ury, Brett and Goldberg explain that just as an interests-based approach can help uncover hidden problems, it can also help the parties identify which issues are of greater concern to one than the other. By trading off issues of lesser concern for those of greater concern, both parties can gain from the resolution of the dispute. Such joint gain is more likely to be realised if the parties focus on each side's interests. Focusing on who is right, as in litigation, or on who is more powerful, as in a strike, usually leaves at least one party perceiving itself as the loser. Reconciling interests, therefore, tends to generate a higher level of mutual satisfaction with outcomes than determining rights or power. If the parties are more satisfied, their relationship benefits and the dispute is less likely to recur. Rights or power-based dispute resolution, with the emphasis on winning and losing, typically makes the relationship more adversarial and strained. Moreover, the loser frequently does not give up, but appeals to a higher court or plots revenge.

Ury, Brett and Goldberg, however, point out that, despite the general advantages of interests-based resolution, it is neither possible nor desirable to resolve all disputes using this approach. In some instances, interests-based negotiation cannot occur unless rights or power procedures are first employed to bring a recalcitrant party to the negotiating table. In other disputes, the parties cannot reach agreement on the basis of interests because their perceptions of who is right or who is more powerful are so different that they cannot

²⁷ Although it should be noted that it is not appropriate to apply this approach to all types of dispute. For example, in discrimination disputes it will often be more appropriate for a dispute resolution system to focus on the rights of the parties as opposed to their interests. See further Astor and Chinkin's (2002: 364-367) review of the nature of discrimination disputes. Provis (1996: 320) also argues that a focus on interests may not be the best approach in some cases as it 'is sometimes difficult to apply, often oversimplifies or conceals the real dynamics of conflict, and in some cases carries a bias against one party, where the party's unity is especially dependent on a unified position.'

²⁸ Costs of conflict may be incurred in terms of resources consumed, opportunities lost, the destruction of each side's resources, and the creation of new injuries and disputes.

establish a range in which to negotiate. A rights procedure may be needed to clarify the rights boundary within which a negotiated resolution can be sought. In some disputes, the interests are so opposed that agreement is not possible. Sometimes a rights or power-based approach may be more desirable, such as the resolution of issues of public importance in a forum, such as litigation, where the outcome establishes future binding law.

Nevertheless, Ury, Brett and Goldberg observe that rights and power procedures are often used where they are not necessary. A procedure that should be the last resort becomes the first resort. They propose that the goal should be an effective dispute resolution system, where most disputes are resolved through negotiating and reconciling interests, some through determining who is right and the fewest through determining who is more powerful. In contrast, the existence of a distressed dispute resolution system within an organisation, which inverts this scenario with most disputes being resolved (or attempted to be resolved) by power, presents a problem which needs to be resolved by a move to an effective dispute resolution system (as illustrated in Figure 2.4). The challenge for the systems designer is to design a system that promotes the reconciling of interests, but also provides low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interests alone.

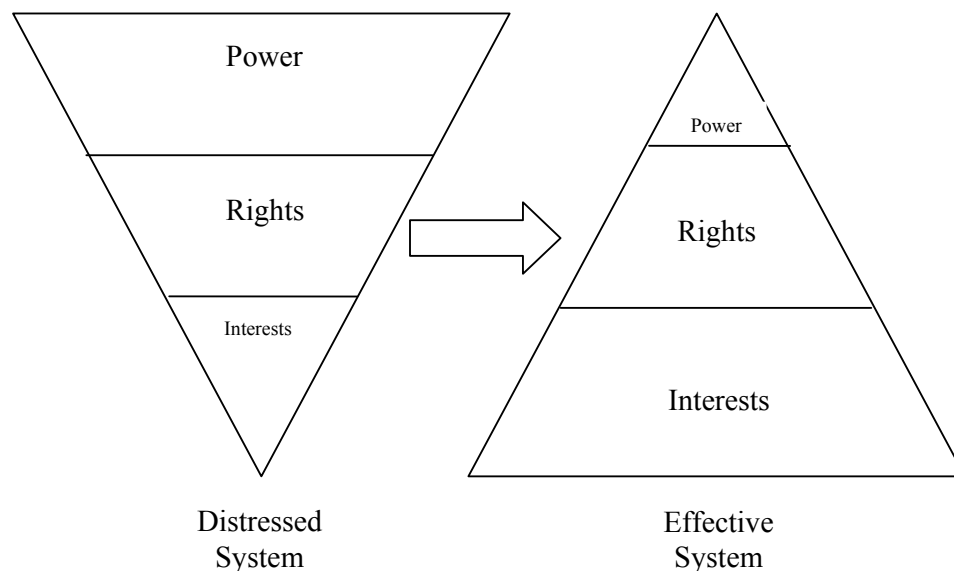


Figure 2.4 – Moving from a Distressed to an Effective Dispute Resolution System

(Source: Ury, Brett and Goldberg 1988: 19)

2.7 Justice, or Fairness, in Dispute Resolution Systems²⁹

According to Mourell and Cameron (2009: 60), who were writing in the context of unfair dismissal dispute resolution, fairness involves balancing legal truth,³⁰ costs and efficiency, and the achievement of fairness must engage in a series of trade-offs to strike an effective balance between these objectives. They consider that the difficulty for the decision-maker lies in weighing up these objectives,³¹ and that these objectives will often be inconsistent between themselves.³²

According to Lindgren J, ‘a mechanism of review that is “economical, informal and quick” may well not be “fair” and “just”, and

Conversely, a system which yields the correct result (ie, legal truth) but at a cost which a party cannot afford or which is disproportionate to the amount involved in the case, may well be unfair. Thus, fairness cannot mean obtaining the legal truth with maximum efficiency and at minimal cost because the fairness elements themselves are interrelated.³³

Justice in judgments of allocation is a fundamental feature of most human social behaviour.³⁴ Therefore, much research has been conducted in the field of social psychology with regards to what people and social groups think constitutes justice in allocation, and the impact of justice in judgments of allocation (concerning resource distribution) upon an individual’s or group’s level of satisfaction and behaviour.³⁵

Justice may be distinguished into two fundamental categories in legal dispute resolutions: procedural justice, and distributive justice (Walker, Lind, and Thibaut 1979: 1402). In a dispute resolution context this may be thought of as the way verdicts are derived, and what

²⁹ For a discussion of the different types of justice in DSD, see generally Bingham (2008).

³⁰ Mourell and Cameron (2009: 59) explain that legal truth ‘requires the decision-maker to identify the true facts and apply the correct law to the facts to arrive at a decision which is indisputable.’

³¹ Citing Bedford and Creyke (2006: 33).

³² Citing Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, Lindgren J, 6 May 1997).

³³ *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, Lindgren J, 6 May 1997).

³⁴ See generally Berkowitz and Walster (1976).

³⁵ See Greenberg (1987: 11-15) for a summary of the key justice research literature.

those verdicts are. As such, according to Greenberg (1987: 10), we may distinguish between approaches to justice that focus on the ends achieved, and the means used to produce those ends.

2.7.1 Distributive Justice

Initially social science theorists tended to suggest that people's perceptions of whether a system of allocation was fair were based upon whether they perceived the decision or outcome to be fair (Howieson 2002: 7). Consequently, research into distributive justice was the first to originate. Early theories of distributive justice – such as equity theory (Adams 1965) and social exchange theory (Blau 1964) – focused on the relationship between rewards received and contributions made between parties to a transaction. These theories viewed a fair allocation of rewards (distributive outcome) as being proportional to the inputs (contributions or investments) of the individuals to the transaction concerned. As applied to litigation, Thibaut and Walker (1978: 548-549) consider that 'distributive justice generally takes the form of evaluating the relative weight of each party's claims for a favourable distribution of outcomes and then rendering an allocative decision that reflects these relative weights.'

As distributive justice research developed throughout the 1970s, other principles of fair allocation in organisations emerged, such as:

- equality (Rescher 1966; Deutsch 1975; Leventhal 1976, 1980), which seeks an equal division of rewards (Leventhal 1980: 30);
- needs (Schwartz 1975), which seeks to match rewards to needs (Leventhal 1980: 30); and
- Deservingness-based allocation (Lerner 1977).

These principles were recognised as sometimes applying in violation of the equity norm in certain appropriate circumstances. For example, Leventhal (1976, 1980: 30-34) formulated his *multidimensional approach of justice judgment* model, which proposed that perceptions of both distributive and procedural³⁶ justice judgments are based on a

³⁶ Leventhal's procedural justice rules are discussed below (see Chapter 2.7.7).

weighted combination of several principles, rather than a single principle as employed in equity theory.³⁷ The weighted combination of principles will differ according to the particular situation. In addition to a contributions principle³⁸ (similar to the equity principle), a needs principle, and equality principle, Leventhal (1980: 32-33) considered, amongst other things, the following distributive, or allocation, principles:

- a principle of *justified self-interest*, which dictates that, in appropriate circumstances, it is fair for an individual to take as much for him or herself as possible;³⁹
- a principle of *adhering to commitments*, which dictates that fairness is violated unless persons receive that which has been promised to them;⁴⁰ and
- an *ownership* principle, which dictates it is fair for individuals to continue to possess rewards and resources that already belong to them.

2.7.2 Procedural Justice

Procedural justice refers to the fairness of the processes or methods used to arrive at a determination of a distributive outcome.⁴¹ Procedural justice recognises that a disputant's satisfaction with a method or system of dispute resolution is a function of process as well as outcome. Procedural justice may be distinguished into objective⁴² and subjective justice – that procedures be fair, and that they appear to be fair (Lind and Tyler 1988: 63). An individual's perceptions of procedural fairness are at least as important as objective measures of procedural justice to their procedural preferences, attitudes towards legal procedures, and behaviour (Lind and Tyler 1988: Chapter 4; Susskind and Cruikshank

³⁷ For example, where maintaining social harmony in interactions to determine outcome is a priority, the perceived fair allocation practice would call for a heavy weighting to be given to the equality rule - dividing distributions equally regardless of possible differential contributions among recipients (Deutsch 1975).

³⁸ Defined by Leventhal (1980: 30) as the matching of rewards to contributions.

³⁹ See further Lerner (1971); Lerner and Whitehead (1980).

⁴⁰ See further Leventhal (1976).

⁴¹ For a comprehensive review of procedural justice literature, see generally Konovsky (2000).

⁴² Amongst the objective criteria used for the evaluation of a procedure in law, Lind and Tyler (1988: 63) identify: the extent to which its outcomes meet standards of fairness and consistency, the accuracy of its decisions, and the cost and efficiency of procedure.

1987: 24-25). Accordingly, Bingham (1997: 215) states, ‘In dispute resolution, the perception of a fair process can be as important as the reality of impartiality.’

After a decade of research based on distributive justice, procedural justice research emerged in the mid-1970s⁴³ when the seminal work of Thibaut and Walker (1975 and 1978) investigated how people think about the fairness of the procedures that generate outcomes or decisions in various forms of dispute resolution. Thibaut and Walker’s findings – particularly the discovery that procedural variation could increase disputant satisfaction with the outcome and the experience of dispute resolution – were so significant that, as Allred (2005: 90) notes, they inspired a vibrant stream of research into procedural justice that continues to this day.⁴⁴ Indeed, Lind and Tyler (1988: 39) report that ‘the gist of work since the publication of the Thibaut and Walker theory has been that procedure and process *per se* are more important and outcomes are less important than theory indicates.’⁴⁵

Lind and Tyler (1988) reviewed both Thibaut and Walker’s work and subsequent procedural justice research in legal and other social allocation settings. From this they drew, amongst other things, the following common findings:

- In most situations procedural justice in judgments leads to enhanced satisfaction. This effect is especially strong when outcomes are negative (Thibaut and Walker 1975; LaTour 1978; Greenberg 1987).⁴⁶ In other words, in situations where an agreement does not wholly fulfil a disputant’s interests, the resolution’s fairness becomes especially important to the disputant’s satisfaction with the outcome.
- Procedural justice is one of the most important factors in determining which procedure will be preferred by those affected by a decision.

⁴³ For a discussion of the reasons for this shift from distributive to procedural research, see Tyler and Blader (2003: 350).

⁴⁴ For a summary of Thibaut and Walker’s work into procedural justice and its consequences, see Lind and Tyler (1988: 7-40).

⁴⁵ Also see Vermunt and Törnblom (1996: 305), who suggest that procedural justice may be more important than distributive justice.

⁴⁶ See Lind and Tyler (1988: 205) for a comprehensive listing of research carried out testing procedural justice enhancement of satisfaction.

- Procedures are viewed as fairer when they vest process control (as discussed further in Chapter 2.7.4), or voice, in those affected by a decision. In other words, as stated by Lind and Tyler (1988: 9), people react more favourably to procedures that give them considerable freedom in communicating their views and arguments.
- Procedural justice affects behaviours as well as attitudes and beliefs. Among the behaviours affected by procedural justice are disputing behaviour, task performance, compliance with decisions and laws, and protest behaviour (Lipsky, Seeber and Fincher 2003: 78).
- As well as in formal legal settings, such as courts of law, procedural justice affects assessments of decision making in other contexts, such as informal legal settings and settings involving politics and work organisations.
- Procedural justice involves more than questions of how decisions are made. It also involves questions of how people are treated by authorities and other parties, such as whether people perceive that their treatment by others shows politeness and respect and allows personal dignity.
- Process control effects are based on more than the desire for fair outcomes. The opportunity to express one's views enhances procedural justice judgments in and of itself.

2.7.3 Antecedents and Consequences of Procedural Justice

As shown in Figure 2.5, Allred (2005: 90) categorises procedural justice research into two categories: antecedents, that lead people to feel that a procedure or interaction was fair; and consequences of individuals' perceptions that a process is fair.

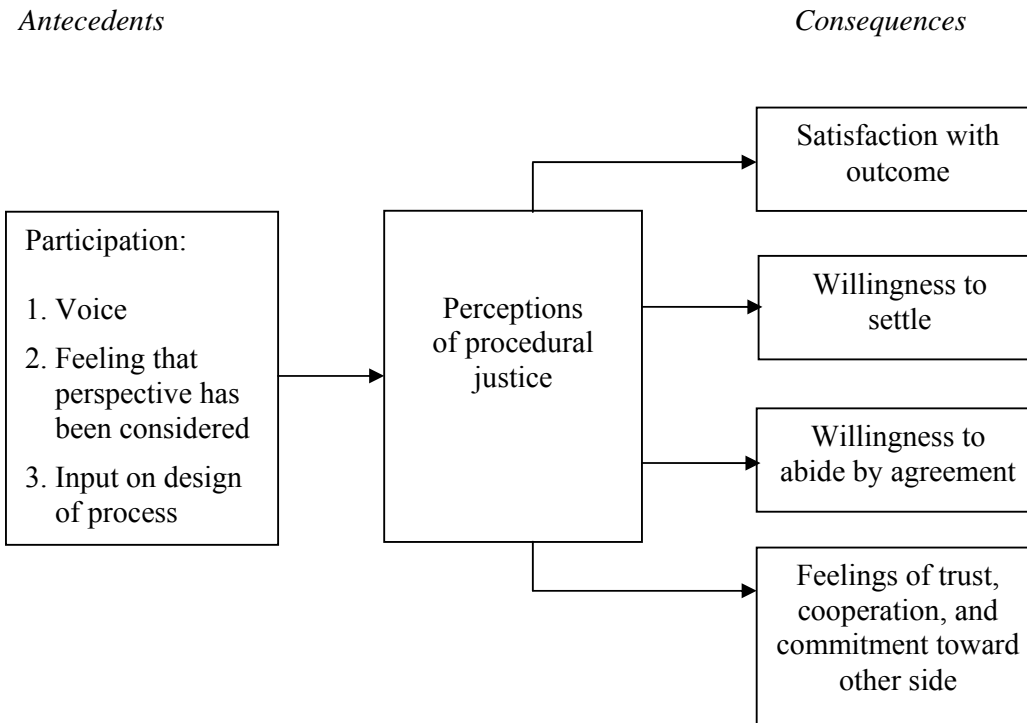


Figure 2.5 – Antecedents and Consequences of Procedural Justice

(Source: Allred 2005: 91)

Allred (2005: 90-91) observes that the most powerful antecedent to an individual's perception of fair process is the degree of participation the individual was allowed in that process – the more one feels he or she was able to participate in a process, the fairer he or she feels the process was. Procedural justice research has identified three particular forms of participation. The first, 'voice', affords an opportunity to articulate one's perspective on the issues at hand. The second is the extent to which one feels their perspective, or voice, is actually heard and considered. Allred (2005: 91) notes that having one's perspective heard does not mean that one has to feel his or her perspective was agreed with to feel that the process is fair, merely that their perspective was given genuine consideration. The third form of participation is participation in the design of the process itself – that a disputant will feel a resolution process is fairer if he or she has been consulted as to what the process should be.

Allred (2005: 91-92) identifies four 'powerful' consequences arising from perceptions of fair process: satisfaction, willingness to settle, willingness to abide by agreement, and feelings of trust, cooperation, and commitment toward the other side. Allred notes that

these consequences will arise from procedural fairness regardless of favourability of outcome. Allred, in particular, emphasises the impact of procedural fairness on relationship between the parties. He states that: ‘The effects of feeling heard and considered on the quality of the ongoing relationship are truly powerful’ (Allred 2005: 92).

2.7.4 The Importance of Control to Procedural Fairness

Thibaut and Walker (1975: Chapter 12) argue that the key procedural characteristic shaping people’s views about the fairness of dispute resolution procedures is the distribution of control between the disputants and the third party decision maker (Tyler and Lind 1992: 138). Two types of control are distinguished by Thibaut and Walker: process control and decision control. Process control refers to control over the development and selection of information that will constitute the basis for resolving the dispute (Thibaut and Walker 1978: 546). Decision control is measured by the degree to which any one of the participants may unilaterally determine the outcome of the dispute (Thibaut and Walker 1978: 546).

According to Thibaut and Walker (1975: 121), distribution of control appears to be the best predictor of fairness. They find that an adequate degree of process control is important to fairness in dispute resolution procedure, because without it there is no dependable basis by which the parties can assure themselves of full opportunities to present their evidence. Additionally, as Howieson (2002: [32]) notes, the control models posit that if people perceive that they have outcome control or process control they will perceive the process as fair, because they have been afforded the opportunity to be instrumental in influencing the outcome in a positive way (Brett 1986; Brett and Goldberg 1983). Tyler and Lind (1992: 139) note that Folger (1977) introduced the term *voice effect* to describe procedural qualities very similar to those termed process control by Thibaut and Walker.

Lind, Kanfer and Early (1990: 952) observe that the voice effect is ‘probably the best-documented phenomenon in procedural justice research.’ They note that numerous

studies⁴⁷ since Thibaut and Walker's work have made it clear that the voice effect enhances procedural fairness even when the individual making the fairness judgment has no direct control over the decision itself. Van Den Bos, Vermunt and Wilke (1996: 426) find that where parties had no expectations about procedure, they found receiving a procedure which gave them an opportunity to voice their opinion more fair than a procedure which did not.

Decision control allows the disputants to maintain a feeling of control over what will happen to them once the dispute is resolved (Brett 1986). Thibaut and Walker (1975: 121) further propose the possibility that third parties who exercise too much control are not likely to be highly trusted by the disputing parties.

2.7.5 Instrumental and Non-Instrumental Theories of Voice

Researchers have identified two aspects to the significance of the voice effect in procedural justice. These aspects relate to instrumental and non-instrumental concerns of the disputing parties.

Thibaut and Walker's work (see Chapter 2.7.4) provides an instrumental explanation as to the importance of the voice effect in procedural justice (Tyler and Lind 1992: 138). Disputants are thought to view procedures as a means to the end of improving their own outcomes,⁴⁸ and 'the opportunity to voice their opinion may heighten disputants feelings of "indirect outcome control"' (Shapiro and Brett 1993: 1167).⁴⁹ In other words, the voice effect allows disputants to feel as though they are being instrumental in determining the outcome of the dispute.

Non-instrumental theories of voice arose from experiments that found voice effect has a unique effect on perceptions of procedural justice independent from outcome control (Lind, Lissak and Conlon 1983; Tyler, Rasinski and Spodick 1985; Heuer and Penrod 1986). Non-instrumental theorists believe that the opportunity to voice, and be heard,

⁴⁷ For example: Folger (1977); Kanfer et al (1987); LaTour (1978); Lind et al (1980); Lind, Lissak, and Conlon (1983); Tyler (1987); Tyler, Rasinski, and Spodick (1985).

⁴⁸ Lind and Tyler (1988: 222) refer to this as the *self-interest model*.

⁴⁹ Citing Brett (1986).

informs people of their relative standing in a group and whether they are respected group members (Platow et al 2006: 136). As such, the ability to voice leads to positive feelings about status within a group, including high self-esteem and group membership (Schroth and Pradhan Shah 2000; Shapiro and Brett 1993). These feelings are said to result regardless of the effect that voice has on the dispute's outcome (Shapiro and Brett 1990: 1167).

2.7.6 Relational Aspects of Procedural Justice

Relational theories of procedural justice focus upon the key, non-instrumental aspects of the relationship between a disputant and the decision maker, or authority. They suggest that how an authority treats a party affects the party's feeling of being valued which, in turn, impacts on their feelings that the procedure was fair. As such, a disputant's feelings of procedural justice will be affected depending upon the extent to which a third party shows them understanding, impartiality and consideration in the decision making process (Bies and Shapiro 1987; Bies, Shapiro and Cummings 1988; Bies and Tyler 1993; Tyler 1987).

Tyler and Lind's (1992: 139-143; 2001: 75-76) *relational model of procedural justice* suggests that the interpersonal and relationship variables of status recognition, neutrality and trust are important determinants of whether a procedure is fair.

They find that status recognition is often communicated to people by the interpersonal quality of the treatment they receive from the authority – whether one is treated politely and with dignity, and whether respect is shown for one's rights or opinions. Bies and Moag (1986) refer to this as *interactional justice*. Building upon Bies and Moag's work, Greenberg (1993, 1994) categorised interactional justice into two types: interpersonal justice and informational justice. Informational justice refers to the adequacy of information imparted about the procedures being used. Greenberg's studies demonstrated that high amounts of interpersonal and informational justice mitigate people's reactions to negative outcomes.

Neutrality involves ‘honesty, unbiased treatment, consistency, factual decision making’ and the perception of a ‘level playing field’ (Tyler and Lind 2001: 75-76) by engaging in even-handed treatment of all involved.

Trust involves beliefs about the intentions and sincerity of the authority – the extent to which it is motivated to try to be fair and whether it is ethical. According to Tyler and Lind (2001: 76):

The perception of a motivation to be fair is crucial to people’s feelings about authorities, since it both reflects the character of the individual authority and is the basis for predicting his or her future behavior.

2.7.7 Leventhal’s Theory of Procedural Justice Judgments

In his *multidimensional approach of justice judgment* model, as referred to in Chapter 2.7.1, Leventhal (1980: 39-46) identifies six general procedural justice principles (which he termed ‘rules’),⁵⁰ as set out below, which may be combined in a weighted form to develop a fairness standard by which a procedure can be assessed:

- i) *The Consistency Rule* – which dictates that procedures should be consistent across persons and over time. With regards to persons, similar procedures should be applied to all potential recipients of reward, in accordance with the closely related notion of *equality of opportunity*. With regards to time, fairness is ensured by keeping procedures stable. This rule dictates that, once people expect a procedure, deviation from the expected procedure will lead to a reduction in perceived procedural fairness (Van Den Bos, Vermunt and Wilke 1996: 413). For example, Van Den Bos, Vermunt and Wilke (1996: 411) found that when parties were led to expect a no-voice procedure, they judged receiving a voice procedure as less fair (inconsistency) than receiving a no-voice procedure (consistency).
- ii) *The Bias-Suppression Rule* – which dictates that personal self-interest and blind allegiance to narrow preconceptions should be prevented at all points in the allocative process. Thus, third party decision makers should not have vested interests in any

⁵⁰ Lind and Tyler (1988: 131) note that Leventhal’s procedural justice rules are largely the result of his intuition and speculation about what makes a procedure fair. However, because Leventhal’s six procedural justice rules have stimulated a good deal of research, there is value in considering them.

specific decision or allow their prior beliefs to obstruct an adequate and equal consideration of all parties' points of view (Lind and Tyler 1988: 131).

- iii) *The Accuracy Rule* – which dictates that it is necessary to base the allocative process on as much good information and informed opinion as possible.
- iv) *The Correctability Rule* – which dictates that opportunities must exist to modify and reverse decisions made at various points in the allocative process.
- v) *The Representativeness Rule* – which dictates that all phases of the allocative process must reflect the basic concerns, values, and outlook of important subgroups in the population of individuals affected by the allocative process.
- vi) *The Ethicality Rule* – which dictates that the allocative procedures must be compatible with the fundamental moral and ethical values accepted by the individual perceiver of fairness.

2.8 Evaluation of Dispute Resolution Systems

Evaluation has been recognised as a key component of successful dispute resolution systems by several authors,⁵¹ who consider it as essential to maximising the effectiveness of, and benefits (monetary and otherwise) obtained from, such systems.

The purpose of evaluation is to determine whether the system is working as intended. Constantino and Sickles Merchant (1996: 168) define evaluation as 'the primary method of feedback ... by which the system clarifies its goals and measures progress toward and achievement of those goals.' As such, it is important to define the goals of the dispute resolution system well, otherwise 'it will be difficult to recognize success even if it occurs since it will be impossible to measure' (Lipsky, Seeber and Fincher 2003: 266).

A successful evaluation scheme will identify whether the system is resulting in any unexpected behaviours and consequences (Lipsky, Seeber and Fincher 2003: 265; Ury, Brett and Goldberg 1988: 80). Evaluation also provides 'the basis for future improvement

⁵¹ See further: Lipsky, Seeber and Fincher (2003: 263-295); Ury, Brett and Goldberg (1988: 80-81); Constantino and Sickles Merchant (1996: 168-186).

of the system through feedback about the parts of the system that are working as intended and those that are not' (Lipsky, Seeber and Fincher 2003: 265).

In order to maximise the chances that an evaluation scheme works well, it should be considered at an early stage of the dispute system design process (Lipsky, Seeber and Fincher 2003: 266; Constantino and Sickles Merchant 1996: 168-169). As Constantino and Sickles Merchant (1996: 169) state:

Integrating evaluation aspects into the design from the beginning – what needs to be measured, in what manner will data be collected, how will results be used – and continually conducting evaluation throughout the design process increases the likelihood that the design will be adjusted to achieve the stated ADR and organizational goals.

However, due to evaluation often being viewed as the last step in the design of dispute systems, coupled with the fact that evaluation is generally expensive and time consuming, many organisations treat evaluation as an afterthought (Lipsky, Seeber and Fincher 2003: 265).

Much has been written regarding criteria, or measures, which can be used for evaluation. A review of the relevant literature identifies the following key criteria for evaluating dispute resolution systems: efficiency, satisfaction, effect on relationship, and stability of outcome.

2.8.1 Efficiency

Efficiency may be measured in terms of the transaction costs of the dispute resolution system option chosen (Ury, Brett and Goldberg 1988: 11; Lipsky, Seeber and Fincher 2003: 167). Transaction costs include the time, money, and emotional energy expended in disputing, the resources consumed and destroyed, and any opportunities lost (Ury, Brett and Goldberg 1988: 11).

Evaluative questions relating to efficiency of dispute resolution systems include: Does the system decrease the cost of conflict management to the stakeholders? Does it directly decrease dollars spent on conflict management? Does it affect intangible costs such as workforce motivation, lost opportunity, or reputation in the marketplace? Does the

introduction of ADR in the conflict management system decrease the time that it takes to resolve disputes? (Constantino and Sickles Merchant 1996: 171-175)

2.8.2 Satisfaction

The parties' satisfaction with the result largely depends on two factors: how much the resolution, or outcome, fulfils the interests that led the party to make or reject the claim in the first place (Ury, Brett and Goldberg 1988: 11); and whether the disputant believes that the resolution is fair (Ury, Brett and Goldberg 1988: 12; Constantino and Sickles Merchant 1996: 171-175 ; Susskind and Cruikshank 1987: 21-33).

As noted in Chapter 2.7.2, even if an agreement does not wholly fulfil a disputant's interests, he or she may draw some satisfaction from the fairness of the dispute resolution procedure. Such satisfaction may depend on several factors including (Ury, Brett and Goldberg 1988: 12; Susskind and Cruikshank 1987: 21-33):

- whether the disputant was given an adequate chance to express their views;
- whether the disputant had control over accepting or rejecting the settlement;
- to what degree the disputing parties were able to participate in shaping the settlement;
- whether the disputant believes that the third party, if there was one, acted fairly; and
- whether the disputant was given access to the technical information they needed.

Evaluative questions relating to disputant satisfaction with dispute resolution systems include: Does the introduction of ADR increase satisfaction with conflict management processes? Is the perception of fairness raised? Does it affect stakeholders' views that they have more control over their destiny when dealing with disputes and more active involvement in resolving them? (Constantino and Sickles Merchant 1996: 171-175)

2.8.3 Effect on Relationship

Effect on relationship considers the ramifications of the dispute resolution approach on the future long-term relationship of the disputing parties (Ury, Brett and Goldberg 1988: 12).

Evaluative questions relating to the effect of a dispute resolution system on the disputing parties' relationship include: Does ADR in the system improve or change the perceptions

and levels of understanding between and among the parties to a dispute about their differing values, interests, and concerns? Does it increase the disputant skills and abilities in communication with each other? Does it increase trust and decrease the level of conflict between disputing parties? Does it result in more effective working relationships? (Constantino and Sickles Merchant 1996: 171-175)

2.8.4 Stability of Outcome

Stability, or durability, of outcome refers to whether the outcome of a dispute resolution system lasts and is not rejected over time by a party (Lipsky, Seeber and Fincher 2003: 167; Ury, Brett and Goldberg 1988: 12). An agreement which is perceived as fair, is reached efficiently and seems technically wise is nevertheless unsatisfactory if it does not endure (Susskind and Cruikshank 1987: 21-33). Recurrence of disputes is directly related to whether a particular approach produces durable resolutions (Ury, Brett and Goldberg 1988: 12).

Evaluative questions relating to the stability of outcomes produced by a dispute resolution system include: Does having ADR options in the conflict management system increase the experience that, once settled, disputes stay resolved? Does it increase compliance with settlements and resolutions? (Constantino and Sickles Merchant 1996: 171-175)

2.8.5 Interrelationship between the Key Evaluative Criteria

The four key evaluation criteria discussed above are interrelated. Dissatisfaction with outcomes may produce strain on a relationship, which contributes to recurrence of disputes, which in turn increases transaction costs (Ury, Brett and Goldberg 1988: 12-13). Consequently, Ury, Brett and Goldberg (1988: 13) refer to all four criteria collectively as the costs of disputing, as they typically increase and decrease together.

Susskind and Cruikshank (1987: 21-33) note that there is a trade off between the attributes of fairness and efficiency. A fair agreement is not acceptable if it takes an inordinately long time to achieve, or if it costs several times what it should have. At the same time, the goal of efficiency may not be considered a priority if it results in a process which is not perceived by the parties to be fair. As perceived fairness largely depends on voice and

participation, those who participate in the agreed outcome, and feel as though their views have been listened to, are more likely to support its outcome. If the involved parties think a given process has been fair, they are more likely to abide by its outcome; if they do not, they will seek to undermine it (Susskind and Cruikshank 1987: 21-33).

Prospects for stability are further enhanced if the disputing parties can maintain, or re-establish, a good working relationship. Win-lose, confrontational methods of settling disagreements create hostility and ill will and, as a result, the slightest flaw in a determination imposed by such methods will be seized on by a disgruntled disputant to scuttle the entire outcome (Susskind and Cruikshank 1987: 21-33).

2.9 The Repeat Player Effect

In his seminal article, Galanter (1974) identifies two types of litigants in the court system who may be distinguished in terms of differences in their size and resources: one-shotters and repeat players. One-shotters tend to be small, have limited access to resources, and have only occasional recourse to the courts, whereas repeat players are more likely to be larger units, have access to significant resources, and be engaged in many similar litigations over time (Galanter 1974: 97).

In an extensive survey of dispute resolution literature across a wide range of disciplines, Galanter (1974: 98-103) finds that repeat players enjoy a position of advantage in the court system over one-shotters for several reasons, including: (1) advance intelligence resulting from experience, which informs how the repeat player structures the next transaction; (2) expertise, ready access to specialists, economies of scale, and low start-up costs; (3) opportunities to develop facilitative informal relations with institutional incumbents; (4) bargaining reputation and credibility; (5) ability to employ long-term strategies calculated to maximise gain over a long series of cases even where this involves the risk of maximum loss in some cases; (6) influencing rules by such methods as lobbying; (7) playing for favourable judicial precedent, or rules, in litigation; (8) distinguishing between rules which are symbolic and those which are likely to 'penetrate'; and (9) ability to invest the resources necessary to secure implementation of rules favourable to them.

At the same time, as noted by Bingham (1997: 195), Galanter recognises that one-shotters typically:

(1) have more at stake in a given case; (2) are more risk averse; (3) are more interested in immediate over long-term gain; (4) are less interested in precedent and favorable rules; (5) are not able to form continuing relationships with courts or institutional representatives; (6) cannot use the experience to structure future similar transactions; and (7) have limited access to specialist advocates.

As such, Menkel-Meadow (1999: 20) suggests:

Law, embedded in society, produces not universalistic truths but variable outcomes that are effected by the endowments of the players who are, in turn, embedded in social structures that shape and transcend what law itself can do.

Galanter (1974: 108-111) presents a typology of one-shot and repeat player litigants in which he describes four permutations of one-shotters (OS) and repeat players (RP): OS versus OS, RP versus OS, OS versus RP, and RP versus RP.

2.9.1 Playing for Rules

Galanter (1974: 101) recognises that the outcomes of a case may be divided into a tangible component and a rule component, and that repeat players are able to trade off tangible gain in any one case for rule gain in order to maximise their tangible gain in a series of cases. The one-shotter, however, will attempt to maximise tangible gain in the one case in which he or she is involved.

Thus repeat players would be expected to strategically settle cases where they expected unfavourable rule outcomes, and select to adjudicate (or appeal) those cases which they regard as most likely to produce favourable rules (Galanter 1974: 101). As Galanter (1974: 102) concludes, ‘we would expect the body of “precedent” cases – that is, cases capable of influencing the outcome of future cases – to be relatively skewed toward those favorable to RP.’

Overall, Galanter highlights the inequity of the court system by contrasting the power which repeat players have to manipulate favourable rules with the significant impediments

one-shotters face in their efforts to bring about social reforms through recourse to the legal system.

2.9.2 Remedial Legislation and Repeat Players

Remedial statutes often provide individuals with a private right of action against a larger, more powerful opponent and, therefore, involve one-shotter individual litigants taking action against repeat players (Albiston 1999: 874). Remedial statutes represent a way ‘to strengthen the position of one-shot players relative to repeat players by transferring rule advantage to the one-shot player’ (Albiston 1999: 870).

Nevertheless, through her empirical study, Albiston (1999: 871) found that, by using their advantages in the court system, repeat players are able to erode the effectiveness of remedial statutes by influencing judicial interpretation of the statute. Accordingly, Albiston (1999: 871) states:

the ultimate scope and power of remedial statutes depend not only on their language, but also on opinions generated by the common law process of the judicial determination of rights in individual disputes. This interpretation process presents another opportunity for repeat players to “play for the rules” and influence the ultimate meaning of a statute.

Albiston (1999: 871) concludes:

that the perceived failure of remedial statutes to bring about social change flows in part from how the litigation process systematically obscures the substantive success of a new law. Although people may experience both success in litigation and significant social change as a result of a new civil right, this progress remains largely invisible in the common law interpretation of that right. Over time, strategic settlement and the litigation process produce judicial interpretations of rights that favor repeat players' interests, limiting the scope and effectiveness of those rights.

2.9.3 ADR and the Repeat Player Effect

Apart from a relatively brief consideration of which social interactions are more likely to be settled through private remedy systems in lieu of the official legal system (Galanter 1974: 124-135), Galanter’s research focused on the repeat player effect in the official court system rather than in ADR.

However, in more recent times, Galanter's work has inspired a new stream of research with respect to the significance of the repeat player effect in ADR, particularly in adhesive binding private arbitration systems⁵² designed and administered by large private organisations in the United States.⁵³ Through her empirical study, Bingham (1997: 215) has found preliminary evidence that the repeat player effect exists in such employment arbitration, and that the repeat player effect creates the perception of an uneven playing field. This extension of Galanter's work may be viewed as a natural progression given that, as observed by Edelman and Suchman (1999: 942), the typical large bureaucratic organisation is consistent with Galanter's definition of a repeat player.

Menkel-Meadow (1999: 35) observes that in ADR some disputants may be repeat players in the use and choice of particular third party neutrals from private rosters of third party neutrals. This, in turn, means that third party neutrals may themselves become repeat players. With respect to third party neutrals as repeat players, Bingham (2008: 45) notes that studies of the repeat player effect in mandatory arbitration explore whether the economic incentive to obtain repeat business from the party in a position to refer future cases to the neutral amounts to a corrupting bias.⁵⁴

2.10 Summary

This chapter started by discussing the reasons for the rise of the modern ADR movement, the various categories of ADR techniques available, and the contemporary use of ADR by organisations in order to develop dispute resolution systems. Next, informed by a review of the social sciences' literature, approaches to resolving disputes in dispute systems design, the theories of justice in dispute resolution, and the evaluation of dispute resolution systems were all considered. The chapter concluded by outlining the repeat player effect, which has been found to have had significant impacts on both the law and perceptions of justice in dispute resolution.

⁵² These self-designed private arbitration processes are used by organisations in the United States to resolve disputes with individuals, who agree to their use by contractual agreement. They have been much criticised for being imposed on individuals and blocking an individual's recourse to the public justice system. See further: Menkel-Meadow (2002: 949); Bingham (2002: 873); Welsh (2001: 23).

⁵³ See further: Edelman and Suchman (1999); Menkel-Meadow (1999); Bingham (1997).

⁵⁴ See Bingham (2008: 45-46, footnote 257) for a list of the relevant studies.

Some of the issues covered in this chapter are particularly important in developing a considered analysis of the operation of statutory adjudication in the construction industry. As such, later chapters in the thesis will return to some of the observations and lessons learned from the general literature on dispute resolution.

Chapter 3

Dispute Management in the Construction Industry

3.1 Disputes in the Construction Industry

Disputes have become an endemic feature of the Australian construction industry (Barrell et al 1988: 15; Love et al 2010: 405). Underlying the majority of construction disputes, as with most commercial disputes, is the commercial imperative for the contracting parties to protect their anticipated financial profit margin and, thus, ensure their commercial survival. However, whilst the propensity for commercial disputes exists in most industries, for various reasons discussed below, the construction industry is generally more prone to contractual disputes occurring than other industries.

Disputes, and their management, are a significant problem to the construction industry primarily because of their costs – both direct and indirect. Direct costs of disputes typically include legal services, arbitration, consultants, courts, and the diversion of in-house resources (both legal and non-legal) to manage dispute resolution processes – for clients, designers and contractors (Cooperative Research Centre (CRC) for Construction Innovation 2009: 11). Indirect costs incurred by the parties typically include delays to the project, adverse performance of the project, distraction and overburdening of staff on the project, reduced morale, erosion of confidence and trust in working relationships, adverse impact on the reputation of the parties, emotional impact on people involved, lost opportunities for future work, destruction of business relationships, and the loss of people to the industry because of wasted effort, disillusionment and frustration (CRC for Construction Innovation 2009: 11). The 1990 National Public Works Conference (NPWC) and National Building Construction Council (NBCC) Joint Working Party report entitled ‘No Dispute’, which aimed to make recommendations to reduce claims and disputes in the Australian construction industry, states:

The consequences of not managing the claims/disputes process properly are that relationships deteriorate, and cause increasing demands upon the senior management personnel of both parties, in addition to unnecessary cost impacts. (NPWC/NBCC Joint Working Party 1990: 175)

The CRC for Construction Innovation (2009: 12) reports that ‘when the direct cost of resolving disputes is added to the avoidable costs [in Australia], the total waste exceeds \$7 billion per year, given construction industry turnover of \$120 billion in 2008-09.’

3.1.1 The Causes of Construction Disputes

Construction projects are generally high risk ventures due to the uncertainty created by the unique and variable nature of each project. As stated by the CRC for Construction Innovation (2009: 11):

The construction of every capital asset involves unique design, procurement and construction challenges. Different location and site conditions, construction methods, equipment and materials, and the assembly and management of a team of people to design, procure and construct each asset invariably mean the construction process is one of creating a prototype.

The myriad of variables on construction projects means that the propensity for events to occur which are unanticipated at the time of contract formation is high.

Further, the provisions of such contracts have often inappropriately allocated the risk of unanticipated events occurring to those who have little or no control over such events (Hibberd and Newman 1999: 5). As Gerber and Ong (2011: 6) state:⁵⁵

Although the Abrahamson Principle – that a risk should be borne by the party that can best manage, minimise or transfer that risk – has been around since the 1970s, it is still commonplace for risk allocation to be lopsided, which is likely to significantly increase the risk of conflict during the project. Standard form contracts have attempted to redress this imbalance, but they are often heavily amended, skewing the risk in favour of the party in the strongest bargaining position.

Numerous studies have been carried out which have examined the causes of disputes in the construction industry. Love et al (2010: 406-408)⁵⁶ provide a comprehensive review of these studies which, amongst other things, identify the following causes of disputes on

⁵⁵ Citing Wassenaer (2006); Gluklick (2002); Matthew Bell (2009). Footnotes omitted from original.

⁵⁶ The studies reviewed by Love et al include: Blake Dawson Waldron (2006); Cheung and Yui (2006); Yiu and Cheung (2007); Killian (2003); Mitropoulos and Howell (2001); Kumaraswamy (1997); Colin, Langford and Kennedy (1996); Sykes (1996); Bristow and Vasilopoulos (1995); Diekmann, Girard and Abdul-Hadi (1994); Heath, Hills and Berry (1994); Rhys Jones (1994); Semple, Hartman and Jergeas (1994); Watts and Scrivener (1992); Hewitt (1991).

construction contracts: ambiguous and/or inadequate contract documents; unrealistic client expectations; unrealistic tendering; poor communication between project participants; poor management; and failure to deal promptly with changes of scope and unexpected conditions. Nosworthy (2005: 166-168) further identifies the following causes: contracting against unrealistic deadlines; unreasonable application of liquidated damages; failure to observe proper principles of risk allocation; lateness of approvals for instructions; subcontractor finance problems; failure to achieve early milestones; excessive written correspondence; failure to appreciate that the contractor is entitled to make a reasonable profit; and aggressive positions being adopted by either side. Additionally, Gerber and Ong (2011: 6-7) identify the perceived bias of the contract superintendent, who is paid by the principal, as an impediment to procedural justice in the administration of construction contracts which contributes to an adversarial environment and encourages disputes.⁵⁷

When an event occurs which threatens the expected profit margin of either contractual party, more often than not a contractual claim will result. As Hibberd and Newman (1999: 2) state:

The respective profit positions of a project may change as a result of the other party's action, and where this happens it may be reasonable to look to the contract to seek redress. The respective profit positions, also, may be threatened by circumstances beyond the control of the parties to the contract. Again, they will look to the contract to secure some form of recompense.

Whilst a claim *per se* does not constitute a dispute, it is often the case that such claims evolve into disputes in the construction industry. In the context of an adversarial construction contract the distinction between a claim and a dispute can, and does, often become blurred. However, whilst a claim is no more than an 'assertion of a right to money, property or remedy' (Powell-Smith and Stephenson 1994: 1), Hibberd and Newman (1999: 1) suggest a dispute cannot materialise from a claim unless there is a 'genuine disputable issue'.

The existence of a dispute is often an important issue as dispute resolution agreements typically require a dispute to exist as a precondition of referral to the relevant form of

⁵⁷ The potential conflict of interests faced by contract administrators in administering construction contracts is discussed in further detail in Chapter 4.3.3.

dispute resolution. In the context of arbitration agreements, the courts have considered what constitutes a dispute. In *Commonwealth of Australia v Jennings Constructions Pty Ltd*,⁵⁸ it was held that: ‘A dispute arises when one party claims something and another notifies the other that he rejects the claim.’ However, as Dorter and Sharkey (1990: 7012) note, a dispute may also arise in ‘a situation where the other party simply ignores a claim made upon him,⁵⁹ that is without either admitting or denying it.’ Thus, even in situations where a claim may be said to be indisputable,⁶⁰ or a sustainable defence not to exist,⁶¹ a dispute can exist.

Gerber and Ong (2011: 5) further draw a distinction between the terms ‘dispute’ and ‘conflict’, which are often used interchangeably. Although many definitions of ‘conflict’ exist, Gerber and Ong (2011: 5) view the most appropriate definition in the construction project context as ‘a situation that arises when individuals are faced with competing goals or ideas.’⁶² Conflict, therefore, is typically the catalyst for claims which, if not mutually agreed and settled by the parties, will become disputes. In order to resolve disputes, at least one of the parties will need to initiate either litigation, arbitration or an ADR procedure. Figure 3.1 illustrates this conflict-claim-dispute-dispute resolution continuum.

NOTE:
This figure is included on page 46 of the print copy of
the thesis held in the University of Adelaide Library.

Figure 3.1 – The Conflict-Claim-Dispute-Dispute Resolution Continuum
(Adapted from Gerber and Ong 2011: 5)

⁵⁸ [1985] VR 586 per Fullagar J at 591 concurring with *Concrete Developments Pty Ltd v Queensland Housing Commission* [1961] Qd R 356 per Philp J at 360.

⁵⁹ See *Ellerine Bros Pty Ltd v Klinger* [1982] 1 WLR 1375 (CA); *Sandhurst Engineering Ltd v Citra Constructions Ltd* (1987) 3 BCL 198.

⁶⁰ See *Tradax Internacional SA v Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344.

⁶¹ See *Halki Shipping Corp. v Sopex Oils Ltd* [1998] 2 All ER 23.

⁶² Citing Dana (2000: 8); Wilmot and Hocker (1998: 1).

The propensity for disputes to occur in the construction industry has been encouraged by the procurement methods and standard forms of contract traditionally used by developers to engage contractors. Predominantly, fixed price lump sum contracts have been let on the basis of a competitive tendering process, where price is the paramount criterion for selection. The tension which exists between the competitive tender price often needed to win the contract and the commercial imperative to achieve financial profit means that the foundations are laid for a culture of conflict from the outset of the project. As Pickavance (2005: 31) states:

Although parties to a building contract may start off with the best intentions, they all walk a tightrope in trying to get the work completed in the agreed time and as cheaply as possible whilst ensuring that C [the contractor] and its subcontractors make a profit.

He continues (Pickavance 2005: 37):

It is self-evident that, when in competition for the contract at the lowest price, the lowest tendering contractor is also the one faced with the highest danger of loss. Only the very naïve developer can be unaware of how much time is spent by the lowest tendering contractor in search of ways to cut losses and redress the balance after the contract has been let.

3.1.2 The Nature of Construction Disputes

From a legal viewpoint, construction disputes have special features as compared to other commercial disputes (Byrne 2007: 398), which accentuate the inefficiencies of litigation discussed in the previous chapter. Byrne (2007: 398-399) identifies, amongst others, the following special characteristics of construction disputes:

- The issues of fact and law which they raise are commonly numerous ... the consequence, very often, is that the trial is required to deal with numerous matters of which any single matter would warrant a full trial in another area of commercial activity.
- They will typically involve complex technical issues. These may concern matters geotechnical, structural, chemical and architectural. They may also be concerned with difficult issues of programming and work practices.
- They usually involve consideration of an enormous number of documents.
- The law is complex.

- Construction disputes have an emotional component which is often absent in other commercial litigation.

3.2 The Rise of ADR and Dispute Avoidance in the Construction Industry

Due to the lengthy and costly nature of court proceedings (as discussed in Chapter 2.2.1), as well as some other reasons discussed below, the construction industry has traditionally turned to arbitration as the preferred method of dispute resolution. Arbitration clauses have long been a feature of building contracts (Byrne 2007: 400), and arbitration has been widely used in the Australian construction industry since the late 1950s and early 1960s.⁶³

Because commercial arbitration agreements have long been entrenched into construction contracts in Australia and, in recent times, arbitration procedure has come to increasingly mirror court procedure (as discussed further in Chapter 3.4.2), many regard arbitration as a formal dispute resolution process rather than a form of ADR. However, in the strictest sense arbitration is a form of ADR as it acts as a substitute for litigation. As such, this thesis refers to arbitration as a form of ADR.

Although originally used for the efficiencies it provided over litigation, arbitration has moved closer to litigation and has become less of an alternative to it (Gordon Bell 2006).⁶⁴ Therefore, arbitration itself has generally become a lengthy and costly construction dispute resolution process. Consequently, since the early 1990s there has been a rapid growth in the promotion and use of other forms of ADR in the construction industry, including: mediation, conciliation, expert determination, mini-trial, expert opinion and adjudication. Indeed, research carried out as early as 1990 found that ‘more than 85 per cent of identifiable ADR is taking place in the construction/civil engineering industry’ (Riekert 1990: 37).

⁶³ Although, as Fitch (1989: 11) reports, there is evidence showing that arbitration was used in the Australian construction industry as long ago as 1856.

⁶⁴ The reasons for both the efficiencies of arbitration, and the erosion of these efficiencies are discussed further below.

Promotion of ADR in the construction industry has been reflected in the dispute resolution provisions of some of the commonly used standard forms of contract conditions, which pay heed to the NPWC/NBCC Joint Working Party's (1990: 183) recommendation that construction contracts should provide for referral to ADR. For example, the Australian Standard (AS) forms – AS 2124–1992, AS 4000–1997, AS 4300–1995 and AS 4902–2000 – require as a prerequisite to arbitration that when a dispute arises, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so.⁶⁵ The Australian Building Industry Contract (ABIC) form ABIC MW-1 2003 provides that if the dispute is not resolved within 10 working days of the delivery of a dispute notice, the parties may refer the matter to one of mediation, expert determination or arbitration.⁶⁶

In addition to increasing use of ADR there has also been, over the past decade, a movement towards dispute avoidance through the use of collaborative procurement methods and other dispute avoidance processes (DAPs). With the exception of statutory adjudication, which will be dealt with in detail in subsequent chapters, this chapter provides an overview of the ADR and DAPs used in the construction industry. Further, judicial review of ADR awards is discussed, including a consideration of the extent to which procedural fairness, or natural justice, is required in ADR.

3.3 Negotiation

Negotiation has been defined by Anstey (1991: 91-92) as:

A verbal interactive process involving two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and in which they seek as far as possible to preserve their interests, but to adjust their views and positions in the joint effort to achieve agreement.

Negotiation, if successful, is the most efficient form of dispute resolution. As such, the NPWC/NBCC Joint Working Party (1990: 177) advised that genuine discussion and negotiation should be encouraged by the disputing parties as clearly being the best and preferred means of achieving dispute resolution. As mentioned above, further to the

⁶⁵ See: AS 2124–1992, clause 47.2 alternative 1; AS 4000– 1997, clause 42.2; AS 4300–1995, clause 47.2; AS 4902–2000, clause 42.2.

⁶⁶ ABIC MW-1 2003 clause P3.

recommendation of the ‘No Dispute’ report (NPWC/NBCC Joint Working Party 1990: 178), several Australian standard forms of general contract conditions now require the parties to confer at least once to resolve the dispute, or to agree on methods of doing so, before taking their dispute to arbitration.

Whilst there are several models of negotiation, the most common model used in the construction industry is that of adversarial negotiation.⁶⁷ Adversarial negotiation involves an approach that seeks to maximise victory, and the bargain generally comes down to how much money one party will get (Spencer and Altobelli 2005: 65). Spencer and Altobelli (2005: 69) note that ‘adversarial negotiation processes are frequently characterized by arguments and statements rather than questions and searches for new information.’

Whilst adversarial negotiations can be effective, an unsuccessful adversarial negotiation may be damaging to the parties’ ongoing commercial relationship if plagued with arguments. This may, in turn, jeopardise the prospects of success in any future negotiations.

Successful negotiation ‘relies on each individual party’s being externally motivated to settle’ (Jones 2006: 227) and, as such, to be willing to negotiate in good faith. There is no general legal obligation for disputing parties to negotiate in good faith.⁶⁸ As Darter and Sharkey (2009: 7121) note, ‘In that arena [ie, negotiation] a party is still not required to make concession after concession or to act otherwise than by having regard to its own interests.’

However, in *United Group Rail Services Ltd v Rail Corporation New South Wales*⁶⁹ (‘*United Group Rail*’), Allsop J considered that that an agreement to negotiate in good faith might be enforceable depending on its terms and context.⁷⁰ As such, in *Coal Cliff Collieries v Sijehama Pty Ltd*,⁷¹ an agreement by the contractual parties to negotiate in

⁶⁷ Other models of negotiation include: integrative, distributive and principled. See further Spencer and Altobelli (2005: Chapter 3).

⁶⁸ See *Walford v Miles* [1992] 2 AC 128; *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

⁶⁹ [2009] NSWCA 177.

⁷⁰ Concurring with Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.

⁷¹ (1991) 24 NSWLR 1.

good faith the details of a joint venture for a new coal mine was held to be too vague and uncertain to be enforceable, whereas the agreement to negotiate in good faith in the context of a structured dispute resolution clause in *United Group Rail* was not. Accordingly, Allsop J stated:

a promise to negotiate (that is to treat and discuss) genuinely and in good faith with a view to resolving claims to entitlement by reference to a known body of rights and obligations, in a manner that respects the respective contractual rights of the parties, giving due allowance for honest and genuinely held views about those pre-existing rights is not vague, illusory or uncertain.⁷²

Allsop J viewed⁷³ that it is possible to negotiate in good faith despite the inherent contradiction which exists between acting in self-interest and the maintenance of good faith. He stated:

the obligation to undertake genuine and good faith negotiations does not require any step to advance the interests of the other party. The process is the self-interested one of negotiation ... there is, however, a constraint on the negotiation, though this constraint is not one to advance the interest of the other party. Rather, it is a (voluntarily assumed) requirement to take self-interested steps in negotiation by reference to the genuine and honest conception of the pre-existing bargain, including the rights and obligations therefrom and of the facts said to comprise the controversy. Within that constraint of those genuinely and honestly held beliefs as to the bargain, the required behaviour is genuine and good faith negotiations with a view to settlement or compromise.⁷⁴

3.4 Arbitration

Arbitration has been defined as ‘a determination by a third party, acting judicially, of differences which have arisen between parties concerning their legal rights, where such determination is to bind them legally’ (Dorter and Sharkey 1990: 7122).

In order for arbitration to be legally permissible and binding, there must be an arbitration agreement in existence. Mix (1997: 466-467) defines an arbitration agreement as ‘a clear indication from the contract language that the parties intended the disputed issue to be

⁷² *United Group Rail* at [74].

⁷³ In contradiction to the decisions handed down in *Walford v Miles* [1992] 2 AC 128 and *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

⁷⁴ *United Group Rail* at [76].

subject to arbitration.’ Such an agreement may be made by the parties either at the time of contract formation, or subsequent to a dispute having arisen. Typically, standard forms of construction contract in Australia provide clauses containing a ‘self-executing reference [to arbitration], which is readily triggered upon a fulfilment of whatever is contemplated, for example, the giving of a notice of dispute for arbitration agreements’ (Dorter and Sharkey 1990: 7123).⁷⁵ Dorter and Sharkey (1990: 7123) consider the parties’ agreement for arbitration is important especially because:

- It is the fundamental foundation and charter for the arbitration which may be conducted; and,
- If it is in writing and its effect is that the parties’ disputes (present or future) be referred to arbitration, it will invoke many, many provisions of the uniform *Commercial Arbitration Act*.

Often in the construction industry the arbitration agreement provided in the construction contract will refer to a specific set of arbitration rules which have been published for general use by a professional body or organisation.⁷⁶ For example, the AS 4000-1997 general conditions of contract provide that, unless otherwise agreed, rules 5-18 of the Rules of The Institute of Arbitrators, Australia for the Conduct of Commercial Arbitrations shall apply.⁷⁷ By referring to such arbitration rules, the parties pre-agree the procedural framework for any potential arbitrations arising from the contract.

Each Australian State and Territory has its own domestic Commercial Arbitration Act, which gives statutory force to, and governs, the arbitration process. In the mid-1980s, the Australian Domestic Commercial Arbitration legislation was successfully unified by the Standing Committee of Attorneys-General (SCAG). Though not in identical form, some States introduced uniform amendments to maintain consistency of the law and processes (Bailey 1998: 40). However, as discussed further below, in 2010 the SCAG developed new uniform Domestic Commercial Arbitration legislation in response to growing frustration with the effectiveness of the existing domestic process (Mulholland and

⁷⁵ See, for example: AS 2124–1992, clause 47.2; AS 4000– 1997, clause 42.2; ABIC MW-1 2003, Clause P3.

⁷⁶ For example, arbitration rules are published by the Royal Institution of Chartered Surveyors, and the Institute of Arbitrators and Mediators Australia.

⁷⁷ See AS 4000-1997, Part A Item 32 b).

O'Reilly 2009: 3). The new uniform legislation has, to date, only been enacted and proclaimed to commence in NSW, Victoria and SA.⁷⁸

For the sake of clarity, the domestic commercial arbitration legislation initially unified in the 1980s shall henceforth be referred to as 'the old uniform Domestic Commercial Arbitration legislation'. The updated uniform legislation developed by the SCAG in 2010 shall henceforth be referred to as 'the new uniform Domestic Commercial Arbitration legislation'.

Under the old uniform Domestic Commercial Arbitration legislation,⁷⁹ the existence of an arbitration agreement which requires parties to first arbitrate their disputes before initiating a court action⁸⁰ cannot prevent a party from taking the dispute to litigation first.⁸¹ However, in practice, a court is unlikely to deny an application by a party for a stay of court proceedings where an arbitration agreement exists except where good reason exists. The situation under the new uniform legislation⁸² is that:

A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.⁸³

⁷⁸ The domestic commercial arbitration Acts that are currently in force are as follows: *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act* (NT); *Commercial Arbitration Act 1986* (ACT).

⁷⁹ S 55 of the old uniform *Commercial Arbitration Acts*.

⁸⁰ Such an arbitration clause is commonly referred to as being in the *Scott v Avery* form, named after the case of that name – *Scott v Avery* (1856) 5 HL Cas 811 – where the House of Lords held that such a clause (ie, one making an arbitration award a condition precedent to bring a court action) was valid.

⁸¹ Thus, the Courts' jurisdiction cannot be ousted by an arbitration agreement.

⁸² S 8(1).

⁸³ See, for example, *Gilgandra Marketing Co-Operative Limited v Australian Commodities Marketing Pty Ltd* [2010] NSWSC 1209, where a defendant to a court action for interim relief was held to have applied too late for a stay of proceedings and, therefore, lost its right to arbitration.

3.4.1 The Advantages of Arbitration over Litigation

As noted above, arbitration was initially pursued as a form of ADR because of the inadequacies of the court system. Warren (2009: 1) cites the following reasons for the rise of arbitration to such prominence in the legal system:

1. frustration by those involved in commerce with the cumbersome processes of the courts and their commensurate delays in determining disputes.
2. The lack of privacy and the necessary risk to business that sensitive information would reach the market place and the media.
3. The desire to in some form or other control the nature and the specialty of the service accessed.

Accordingly, the advantages offered by arbitration, when it was first adopted by the construction industry as a substitute for litigation, were that it was a speedier and cheaper method of finally resolving disputes, determined by a specialist tribunal in private proceedings which could be appropriately tailored and agreed upon by the parties to suit the needs and nature of their dispute.

Arbitration allowed the flexibility for the parties to keep the proceedings simple. Thus, initially, significant time savings were afforded by arbitration over litigation due to the less onerous procedural requirements of arbitration which, consequently, resulted in less legal costs (particularly lawyers' fees). For example, procedurally, arbitration:

- does not have to comply with the strict legal rules of evidence, but allows wide latitude with respect to accepting evidence (Mix 1997: 468);
- permits limited discovery – an exchange of relevant documents only and few, if any, depositions (Joyce 2008: 15); and
- permits avoidance of the time consuming and expensive practice of lawyers having to draft potentially numerous legal briefs in connection with the filing of motions (Joyce 2008: 15).

Further, unlike litigation, arbitration costs were not commonly inflated by appellate procedures. This was due to the fact that the grounds of appeal to an arbitration award used to be strictly limited to cases involving fraud or corruption, breaches of natural

justice, or the arbitrator exceeding his or her authority (Joyce 2008: 16). Judicial involvement, and interference, with the arbitration process was initially minimal.

Unlike court proceedings, arbitration proceedings are not open to the public. Only the parties with a direct interest in the arbitration are entitled to attend arbitration hearings (Mix 1997: 468), and arbitration awards are not published in publicly available reports.

In arbitration, the arbitrator will have specialist experience and expertise relevant to the disputed matter. The arbitrator is appointed either by mutual agreement of the disputing parties, or following nomination by an agreed professional industry or legal organisation.⁸⁴ This is particularly advantageous in the construction industry due to the complex technical nature of most disputes.

3.4.2 The Need for Arbitration Reform in Australia

The construction industry initially turned to arbitration as a more flexible and, consequently, cheaper and quicker method of resolving disputes. However, despite the advantages it initially offered, in more recent times arbitration has come under intense criticism, from both the construction and legal professions, for being a slow and expensive dispute resolution procedure.⁸⁵ Accordingly, Jones (2009: 4-5) comments that ‘in many instances it [arbitration] is less cost effective than commercial court proceedings in a number of States’, and further criticises arbitration in Australia for having ‘fallen behind other forms of ADR as an effective means of binding dispute resolution’, and having ‘failed to keep pace with improvements in litigation procedure.’

Over twenty years ago, the NPWC/NBCC joint working party (1990: 182-185) reported that ‘The original intent of Arbitration seems to have been lost, and there is now little procedural difference between arbitration and litigation’, and went as far as recommending

⁸⁴ For example, unless otherwise agreed by the parties, the AS 2124–1992 general conditions of contract (clause 47.3) provide for the Chairperson of the Chapter of the Institute of Arbitrators Australia to nominate an arbitrator, and the AS 4000-1997 general conditions of contract (Part A Item 32) provide for the President of the National Dispute Centre to nominate an arbitrator.

⁸⁵ For a detailed discussion of impediments to the effective operation of domestic arbitration processes in Australia see, generally, Megens and Cubitt (2009).

that ‘arbitration and litigation should be regarded as an absolute last resort for dispute resolution.’

This apparent evaporation of the efficiencies initially offered by arbitration is primarily due to the increasing tendency there has been for arbitration proceedings to be conducted in a similar manner to court procedures (Spigelman 2007).

Megens and Cubitt (2009: 122) observe that:

From a procedural perspective, there does not appear to be any clear advantage to arbitration above Court processes if all it does is mimic the Court process. Certainly, the standard arbitration process bears many resemblances to that used in Court proceedings: (1) points of claim; (2) points of defence; (3) points of counterclaim; (4) discovery; (5) lay and expert witness statements; (6) request for further and better particulars; and (7) formal hearings conducted on adversarial lines.

Recognising that commercial arbitration needed to become more efficient, the Institute of Arbitrators and Mediators Australia (IAMA) launched their new Arbitration Rules in 2007 ‘with a focus on setting up innovative new rules which would guide parties into quicker and cheaper outcomes’ (James 2007: 1). The new IAMA Arbitration Rules incorporate an option for Fast Track Arbitration Rules, which enable the arbitrator to produce an award within 150 days after the arbitrator enters upon the reference.⁸⁶

Whilst the IAMA Rules represent a step in the right direction, the transformation of the flexible arbitration procedure into that of formal litigation procedure is one that has been encouraged by wide judicial interpretation of the provisions in the old uniform Domestic Commercial Arbitration legislation, which permit judicial review of arbitral awards for error of law⁸⁷(as discussed further in Chapter 3.11) and the setting aside of arbitral awards for technical misconduct (as discussed further in Chapter 3.12.3).⁸⁸

⁸⁶ See James (2007) for an overview of the fast track procedure prescribed by the 2007 IAMA Arbitration Rules.

⁸⁷ S 38 of the old uniform *Commercial Arbitration Acts*.

⁸⁸ S 42(1)(a) of the old uniform *Commercial Arbitration Acts*.

3.4.3 The New Uniform Domestic Arbitration Legislation

On 7 May 2010, the SCAG announced⁸⁹ that the Commonwealth, State and Territory Ministers had agreed to implement the model Commercial Arbitration Bill 2010.⁹⁰ This new uniform Domestic Commercial Arbitration legislation, following the lead of the Australian Commonwealth *International Arbitration legislation*,⁹¹ is based upon the *UNCITRAL Model Law on International Commercial Arbitration* (the ‘Model Law’), developed by the United Nations Commission on International Trade Law (UNCITRAL) for transnational arbitrations. However, the new Australian uniform Domestic Commercial Arbitration legislation is supplemented by additional provisions to make it appropriate for domestic arbitrations in the Australian context.⁹² As previously mentioned, the only jurisdictions where the new uniform Domestic Commercial Arbitration legislation has come into force to date are NSW, Victoria and South Australia. Although new uniform legislation has received royal assent, but is yet to be proclaimed, in Tasmania⁹³ and NT,⁹⁴ and bills are currently before Parliament in WA⁹⁵ and Queensland.⁹⁶

At the heart of this legislative reform is the key objective of restoring domestic commercial arbitration to an efficient ADR process. As such, the paramount object of the legislation is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.⁹⁷ This legislation aims to achieve its paramount object by:

⁸⁹ See SCAG Communiqué of 7 May 2010 at: [http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communicu%C3%A9_7_May_2010v2.pdf/\\$file/SCAG_Communicu%C3%A9_7_May_2010v2.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communicu%C3%A9_7_May_2010v2.pdf/$file/SCAG_Communicu%C3%A9_7_May_2010v2.pdf), viewed 14 June 2012.

⁹⁰ Available on the SCAG website at: [http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Model_Commercial_Arbitration_Bill_2010.pdf/\\$file/Model_Commercial_Arbitration_Bill_2010.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Model_Commercial_Arbitration_Bill_2010.pdf/$file/Model_Commercial_Arbitration_Bill_2010.pdf), viewed 14 June 2012.

⁹¹ On 6 July 2010, the *International Arbitration Amendment Act 2010 (Cth)*, which adopts the 2006 amendments to the *UNCITRAL Model Law on International Commercial Arbitration*, received Royal Assent.

⁹² For a comprehensive review of the new uniform domestic commercial legislation see, generally, Jones (2010).

⁹³ *Commercial Arbitration Act 2011* (Tas).

⁹⁴ *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).

⁹⁵ *Commercial Arbitration Bill 2011* (WA).

⁹⁶ *Commercial Arbitration Bill 2011* (Qld).

⁹⁷ See s 1C(1) of the new uniform *Commercial Arbitration Acts*.

Harmonisation of Security of Payment Legislation

- (a) enabling parties to agree about how their commercial disputes are to be resolved; and,
- (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.⁹⁸

The parties' autonomy to agree on arbitration procedure is tempered by the provision that the legislation must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of the Act is achieved.⁹⁹ It is, thus, made clear that the legislative intent is for arbitration to be, as Jones (2009: 7) puts it, 'a different process to court proceedings.' As the new uniform legislation states, such safeguards are necessary in the public interest.¹⁰⁰ However, in light of the new uniform legislation's requirement that each party must be given a reasonable opportunity of presenting its case,¹⁰¹ de Fina (2010: 388) casts doubt upon the effectiveness these provisions, stating:

At its essence an arbitration is the creature of the parties' conduct and ... in complex disputes the obligation to allow a party a reasonable opportunity to present its case cannot permit imposition of limitations having the effect of denying a party such an opportunity.

The new uniform legislation restricts the scope for judicial intervention by providing an exhaustive list of specific circumstances warranting recourse to the courts (as discussed further in Chapter 3.11). Additionally, the new uniform legislation provides several other features in an attempt to make domestic commercial arbitration more 'user-friendly' and efficient. These include, amongst others:

- the power for an arbitral tribunal¹⁰² to order interim measures,¹⁰³

⁹⁸ See s 1C(2) of the new uniform *Commercial Arbitration Acts*.

⁹⁹ See s 1C(3) of the new uniform *Commercial Arbitration Acts*.

¹⁰⁰ See, s 1C(2) of the new uniform *Commercial Arbitration Acts*.

¹⁰¹ See s 18 of the new uniform *Commercial Arbitration Acts*.

¹⁰² S 2(1) of the new uniform *Commercial Arbitration Acts*, for example, states that arbitral tribunal means a sole arbitrator or a panel of arbitrators.

¹⁰³ See Part 4A of the new uniform *Commercial Arbitration Acts*.

- detailed, prescriptive provisions that provide for an arbitrator to act as mediator, conciliator or other non-arbitral intermediary¹⁰⁴ where the parties have expressly agreed such,¹⁰⁵
- the power for an arbitrator to make an award ordering specific performance of any contract;¹⁰⁶
- the power for an arbitrator to order consolidation of related proceedings;¹⁰⁷ and
- strict provisions regarding the circumstances in which confidential information in relation to arbitral proceedings may be disclosed.¹⁰⁸

It remains to be seen whether the new uniform Domestic Commercial Arbitration legislation will cure the ills which came to beset the old uniform legislation. Sceptics point to the fact that it was not the old uniform legislation *per se* that was the problem but rather the conduct of the arbitrators and statutory interpretations of the courts. As such, de Fina (2010: 393) suggests:

The previous Acts were not of themselves the basis of criticism of arbitration. The manner of conduct by arbitrators and the outcomes are the touchstone and the source of dissatisfaction ... For disputes in the building and construction industries, little has changed. The most important consideration for parties is not so much the changes in the law but selection of knowledgeable, appropriate and pro-active arbitrators who will use the provisions of the law in administering arbitrations and come to appropriate conclusions in a timely and cost-effective manner.

3.5 Mediation and Conciliation

Astor and Chinkin (2002: 135) describe mediation as follows:

The term mediation is often invoked to describe a structured process involving a third party who is impartial as between the parties and who strives to remain as neutral as possible. The process is

¹⁰⁴ Note, however, that the legislation also precludes an arbitrator who has acted as mediator in mediation proceedings that are terminated from conducting subsequent arbitration proceedings in relation to the dispute unless the parties to the arbitration consent otherwise in writing.

¹⁰⁵ See s 27D of the new uniform *Commercial Arbitration Acts*.

¹⁰⁶ See s 33A of the new uniform *Commercial Arbitration Acts*.

¹⁰⁷ See s 27C of the new uniform *Commercial Arbitration Acts*.

¹⁰⁸ See s 27E of the new uniform *Commercial Arbitration Acts*.

designed to discover the nature of the disputed issues between the parties and to consider options for dealing with them. Mediation assists the parties to make decisions about ways of dealing with the issues between them and to reach agreement about disputed issues. Whilst the role of the third party may vary considerably, it does not extend to the mediator deciding the outcome.

Mediation *per se* is, therefore, a non-binding process. The role of the third party neutral is not adjudicatory, but rather ‘to help break down barriers to negotiation and in the process help each party appreciate the other side’s case’ (Jones 2006: 227). The mediator effectively aims to facilitate productive negotiations between parties who have failed to do so by themselves. Such ‘facilitative mediation’ is carried out by a trained, skilled mediator, who is able to explore the parties’ positions, provide a means of communication between the parties, enhance the parties’ common interests, and provide an ambience that is conducive to the parties finding their own solution to their dispute (Hibberd and Newman 1999: 60). Mediation, in its purest form, is wholly facilitative and, therefore, the mediator does not express opinions or propose settlements with respect to the parties’ dispute (Hibberd and Newman 1999: 60).

There are various techniques which a mediator may use in facilitative mediation.¹⁰⁹ Jones (2006: 227) views that the best technique which a mediator may use to get the parties to negotiate in a construction dispute is that of separating the parties and the mediator shuttling back and forth between them. Golvan (1996: 194) recommends that it can be useful for the mediator to adopt a technique whereby the parties are encouraged to break up offers into as many subcomponents as possible, as offers expressed in this form enable parties to ‘trade off’ between elements of the offer until a settlement is reached.

If the mediation process is successful and results in the parties reaching a settlement to the dispute, the settlement may be reduced to a binding written agreement at the immediate conclusion of the mediation.¹¹⁰

Mediation has become an increasingly accepted, used, and effective method of resolving construction disputes in Australia (Steinepreis 2008: 92; Aibinu, Akin-Ojelabi and

¹⁰⁹ For a discussion of mediation techniques used in construction disputes, see, generally: Golvan (1996); Steinepreis (2008).

¹¹⁰ See Gould, King and Britton (2010: 8-9) for an overview of the various stages in the mediation process.

Gardiner 2010: 33). Whilst mediation is generally understood by parties in the construction industry to be a private voluntary process, it may also be mandated by Australian courts and tribunals¹¹¹ as part of their case management procedures (Aibinu, Akin-Ojelabi and Gardiner 2010: 27).¹¹² Such court-annexed mediations may be mandated with or without the consent of the parties,¹¹³ and are mediated by a court-appointed accredited mediator (usually a court officer).

Mediation has many advantages as a method of ADR. Compared to arbitration and litigation, mediation is much quicker and cheaper (Jones 2006: 227; VCAT 2003; Hibberd and Newman 1999: 81; Cheung and Suen 2002: 563; Gould, King and Britton 2010: 53). Due to its less adversarial nature and emphasis on facilitating communication between the disputing parties, mediation often allows the parties to have their say (or 'vent'), reduces the tension between parties, and is much more effective than adversarial dispute resolution procedures in helping to preserve existing business relationships (VCAT 2003; Cheung and Suen 2002: 563). Mediation is also confidential (VCAT 2003; Hibberd and Newman 1999: 83), and 'gives scope for creative and commercial solutions which satisfy the particular requirements of the parties and are often unavailable by trial or arbitration' (Golvan 1996: 190).

As private ADR processes, the terms mediation and conciliation are often used interchangeably in the construction industry, and there is some confusion as to the distinction between the two in ADR literature (Aibinu, Akin-Ojelabi and Gardiner 2010: 32). Whilst they are similar in that they are non-binding processes in which a third party neutral attempts to assist the parties to reach a settlement, the main distinction is that, unlike in a pure mediation procedure, the role of a conciliator is more than just facilitative.

As such, Dorter and Sharkey (2009: 7115) note that a conciliator need not necessarily be impartial. Aibinu, Akin-Ojelabi and Gardiner (2010: 33) liken the conciliation process to 'evaluative mediation' in that the conciliator may evaluate the dispute, provide advice to

¹¹¹ For a discussion of the use of mediation and other ADR processes in the Australian court and tribunal system, see, generally, Sourdin (2003).

¹¹² For example, with respect to domestic building disputes, the Victorian Civil and Administrative Tribunal (VCAT) (2010: 23) report that in 2008/09, 268 cases were finalised at mediation representing a 64% mediation success rate.

¹¹³ See, for example, *Civil Procedure Act 2005* (NSW), s 26.

the parties on likely settlement terms, make suggestions as to the terms of settlement, and actively encourage the parties to reach an agreement (Spencer and Altobelli 2005: 17). Gould, King and Britton (2010: 6) note that:

In practice, a mediation that starts off in a purely facilitative way may become evaluative in order to try and reach a settlement. This may occur intentionally, at the request of the parties or with forethought on the part of the mediator, or unintentionally by the words or actions of the mediator. The boundary is clear in theory, but not necessarily in practice.

In the construction industry, conciliation is generally understood to be a private, voluntary ADR process used by disputing parties to a construction contract, as opposed to statutory conciliation where the conciliator will actively encourage the participants to reach an agreement which accords with the advice of the statute (National Alternative Dispute Resolution Advisory Council (NADRAC) 2011). The impact of the law, therefore, in the case of conciliation under a statutory scheme¹¹⁴ will inevitably be more considerable, and consequently be more restrictive on party control, than in a private conciliation or mediation process which has been freely agreed by the parties (Astor and Chinkin 2002: 87).

3.6 Med-Arb

Med-Arb is a hybrid of the mediation and arbitration procedures. It is a technique sometimes, but not widely, used in the construction industry (Fenwick Elliott 2004). Med-Arb has been defined by Aibinu, Akin-Ojelabi and Gardiner (2010: 33) as:

A situation where the third party, in the first instance, mediates the dispute between the parties; if mediation fails, the third party becomes an arbitrator and hands down decisions on the issues involved in the conflict.

If the mediation and arbitration are carried out by the same neutral person, Med-Arb may give rise to several ‘jurisprudential difficulties’ (Fenwick Elliott 2004),¹¹⁵ not least of which is the question of how a fair determination can be made by an arbitrator, who may

¹¹⁴ Such schemes, for example, are provided for by s 49 of the *Fair Trading Act 1998* (NSW) and s 66 of the *Guardianship Act 1987* (NSW).

¹¹⁵ For a discussion of these difficulties, see Spencer and Altobelli (2005: 253).

have previously been privy to private information or expressed an opinion on the likely dispute outcome during mediation or conciliation.

3.7 Expert Determination

Expert determination has been described by Tozer (2008: 238) as follows:

an adjudicative process in which an independent expert in the subject matter of the dispute is appointed to investigate and deliver a decision which the parties agree will be determinative of the issues between them. The details of the process to be adopted depend on the rules and procedures that have been formulated and agreed between the parties.

There is some similarity, on one hand, between expert determination and the process of independent valuation sometimes provided for in contracts, whereby the parties expressly agree that certain contractual matters (eg, property rental values) will, in the event of a failure of the parties to agree, be valued by a nominated third party expert, or valuer, according to their professional skill, knowledge and experience.¹¹⁶

On the other hand, expert determination also has some similarity to arbitration in the respect that a dispute is referred for final and binding determination to a third party neutral. Expert determination, however, differs from arbitration in that the third party neutral is under no obligation to carry out their enquiry in a judicial manner.¹¹⁷

Accordingly, the expert determination process has been described as lying between arbitration and mere valuation by Lord Esher in *Re Carus v Wilson and Greene*¹¹⁸ in that, ‘though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence and arguments.’

In the Australian construction industry there has been an increased interest in expert determination over the past 20 years and, as such, provisions have often been included in contracts whereby the parties agree to be bound by a decision of a third party expert, who

¹¹⁶ For a comprehensive review of expert determination in Australia, see generally McHugh (2008).

¹¹⁷ See *Re Carus v Wilson and Greene* (1886) 18 QBD 7 at 9.

¹¹⁸ (1886) 18 QBD 7 at 9.

is not an arbitrator, when a dispute arises. Such provisions usually set out the rules and procedures for the agreed expert determination process. In *The Heart Research Institute Ltd v Psiron Ltd*,¹¹⁹ Einstein J stated:

Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the *Institute of Arbitrators and Mediators of Australia*, the *Institute of Engineers Australia* or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted.

Unlike arbitration, expert determination is not subject to statutory oversight. Unfettered by any obligation to hear the dispute in a judicial manner, the expert may ‘rely on his or her own expertise in determining the issue which has been referred without giving the parties the opportunity to comment on those views’ (Hunt 2000: 28). Additionally, experts are not under any duty to determine the dispute according to the law, unless the parties have expressly required such in the dispute resolution agreement. As stated by Gillard J in *Commonwealth of Australia v Wawbe Pty Ltd & Pinebark Park Pty Ltd*.¹²⁰

The parties to a contract agree that the value is to be determined by an expert acting as such and using his own skill, judgement and experience. He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties' common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination “warts and all” and subject to such deficiencies as one would expect in the circumstances. The parties put in place the procedure, they must accept the result unless it would be contrary to their common intention.

Experts in Australia, therefore, generally act inquisitorially,¹²¹ actively gathering information relevant to the dispute, and having regard to their special knowledge rather

¹¹⁹ [2002] NSWSC 646 at [17].

¹²⁰ [1998] VSC 82 at [17].

¹²¹ *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8.

than the argument from the parties, which they are not required to hear (Glass et al 2009: 44).

The expert's procedural approach is, however, subject to the express terms of the parties' expert determination agreement. Therefore, if the parties so choose, they can agree for the expert to adopt a judicial approach. However, where an expert has conducted proceedings in a judicial manner, courts have had to consider whether the process has transformed into arbitration. In considering the distinction between expert determination and arbitration in *Northbuild Construction Pty Ltd v. Discovery Beach Project Pty Ltd*,¹²² Mullins J stated:

In some instances ... the points of distinction between how an arbitration and an expert determination are carried out may not be significant. The description by the parties of the process is relevant, but not conclusive. There is no restriction on the nature of the disputes which the parties can agree will be the subject of expert determination ... It depends on the terms of the relevant contractual provisions pursuant to which the expert determination is initiated.

The courts have held that an expert determination which adopts a judicial approach does not become an arbitration where the expert was given a discretionary power to implement such a judicial approach under the contractual agreement.¹²³ Thus, it would seem that in circumstances where an expert is obliged to follow a prescribed judicial procedure when making their determination, there is a strong argument that arbitration exists.

The informal nature of expert determination proceedings allows it to be far more cost effective than litigation or arbitration (Tozer 2008: 242). This informality, however, has also formed the basis for criticism of expert determination as being unsuitable for determining disputes involving complex legal and factual issues,¹²⁴ or questions of credit (Hunt 2000: 27). As Easton (1999: 33) observes:

With the absence of traditional litigation/arbitration procedures such as discovery of documents and the testing of evidence by cross-examination of witnesses, the expert determination process has

¹²² [2007] QSC 206 at [71].

¹²³ See *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206 at [88], on appeal [2008] QCA 160.

¹²⁴ See *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 per Gillard J at [68].

given rise to concerns (both from the parties and the expert) about the lack of ability to test and establish disputed facts and the necessarily arbitrary outcome of some decisions by the expert.

The courts have been reluctant to interfere with expert determinations,¹²⁵ and successful challenges to expert determinations have generally been limited to circumstances where the expert has acted outside the terms of appointment (de Fina 1998: 24).¹²⁶

Where expert determination clauses have omitted rules and procedures, and the parties have been unable to subsequently agree on them, courts have generally not been willing to declare the clauses void for uncertainty. In such circumstances, the common practice is to allow a third party,¹²⁷ or the expert,¹²⁸ to step in to make a decision about procedure to prevent the expert determination from breaking down (Jones 2006: 229).

3.8 Expert Opinion

Expert opinion is distinct from expert determination in that it is non-binding. The dispute is referred by the parties to a neutral expert, who assesses the relative strengths and weaknesses of each party's case and then offers an opinion as to the likely outcome of any court proceedings (Spencer and Altobelli 2005: 219).

The non-binding opinion of the expert 'can operate as a harsh reality-check on the parties' (Jones 2006: 227), and provide the grounding for subsequent negotiations which may be more likely to succeed in the light of a third party neutral opinion. However, as Jones (2006: 227) points out, the outcome of such subsequent negotiations is likely to depend on the level of respect that the parties have for the expert.

3.9 Mini-Trial

Spencer and Altobelli (2005: 20) define a mini-trial as:

¹²⁵ See, for example, *Shoalhaven City Council v Firedam Civil Engineering Pty Limited* (2011) 281 ALR 635.

¹²⁶ See, for example, *A Hudson Pty Ltd v Legal General Life of Australia Limited* (1986) 61 ALJR 280.

¹²⁷ See, for example, *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305.

¹²⁸ See, for example, see *Fletcher Constructions Australia Pty Ltd v MPN Group Pty Ltd* (Unreported, NSWSC, Rolfe J, 14 July 1997).

A process where information is exchanged before a panel comprising representatives of the organisations to which the parties belong, who are authorised to reach a settlement. Usually there will be an impartial third party who, with the rest of the panel, will hear both sides of the dispute, chair a question and answer session with all the participants, after which the panel will seek to negotiate a settlement.

As with expert opinion, the mini-trial process is non-binding, and the outcome is intended to form the basis for subsequent successful negotiations. As Hibberd and Newman (1999: 115) state:

The mini-trial is not really a trial at all (e.g. the legal rules of evidence are usually dispensed with), but a settlement procedure designed to convert a legal dispute back into a business problem. It aims to bring the businessmen on each side of the fence directly into the resolution process in the hope that compromises can be reached.

Mini-trials became increasingly used in the United States' construction industry in the 1990s. A 1998 survey of Fortune 1000 companies in the United States, found that 36% of construction/mining corporations who responded had used mini-trials (Lipsky and Seeber 1998: 12).¹²⁹ No research appears to have been published regarding the frequency of use of mini-trials in the Australian construction industry. However, anecdotally, it would seem that the use of mini-trials in the Australian construction industry is not nearly as common as in the United States.

3.10 Dispute Avoidance Processes (DAPs)

Gerber and Ong (2011: 8) define DAPs as the umbrella term used to describe a myriad of dispute prevention mechanisms that are being used on large-scale construction projects around the world. The primary aim of DAPs is to diffuse conflict as and when it arises on construction contracts, and before it has the opportunity to escalate into a dispute. DAPs also anticipate that sometimes disputes cannot be avoided and, as such, provide for some form of 'real-time' dispute resolution system (Gerber and Ong 2011: 11).

DAPs differ from ADR and litigation in that they are proactive rather than reactive to the occurrence of disputes. By contrast, ADR mechanisms and litigation will generally only

¹²⁹ Additionally, a 1990 survey of more than 500 construction lawyers in the United States found that about 20% had participated in a mini-trial (Stipanowich and Henderson 1992: 317).

come into existence if there is a dispute and reference is made to them (Mohd Danuri et al: 352).

Accordingly, Gerber and Ong (2011: 7) explain that, as shown in Figure 3.2, DAPs are designed to operate as a circuit breaker, preventing the escalation of conflicts into disputes, whereas ADR generally operates as a circuit breaker only *after* a dispute has matured and is well on the path to litigation or arbitration.

NOTE:
This figure is included on page 68 of the print copy of
the thesis held in the University of Adelaide Library.

Figure 3.2 – Interrupting the Conflict-Dispute-Litigation Continuum
(Source: Gerber and Ong 2011: 7)

Brewer (2007: 22) categorises processes for dispute avoidance into two types: management methods aimed at achieving better risk control, and non-escalation mechanisms which are aimed at resolving disputes before they escalate. Over the past 20 years in the construction industry globally, there has been a proliferation of the use of dispute avoidance management methods in the form of collaborative procurement methods, or relationship contracting (eg, project alliances). Similarly, there has been a rise in the use of non-escalation mechanisms, particularly in the form of dispute boards (eg, dispute review boards). As Gerber (2012: 57) explains:

Project alliances (also referred to as “alliancing”) and dispute review boards (DRBs) are two models of DAPs that have gained traction in different parts of the world and which have taken completely different approaches to dispute avoidance. Alliances are all about avoiding third-party involvement in dispute avoidance and management, and requiring the contracting parties to develop

solutions on their own. DRBs, on the other hand, involve embracing third-party involvement, from the commencement of the project, to assist with dispute avoidance.

3.10.1 Relationship Contracting

In 1999, the Australian Constructors Association (ACA)¹³⁰ (1999: 4) referred to relationship contracting as ‘the way forward for the Australian construction industry’, and defined relationship contracting as ‘a process to establish and manage the relationships between the parties that aims to remove barriers, encourage maximum contribution and allow all parties to achieve success.’

The emergence of relationship contracting in the form of various innovative construction procurement paths was encouraged by the recommendations of various Government commissioned reports in Australia and the UK (Gyles 1992; Latham 1994; Egan 1998), which stressed the importance of cooperative relationships to the delivery of efficiency and quality in construction projects.

Jones (2006: 226) observes that there are a wide and flexible range of approaches to managing the owner-contractor relationship which recognise there is mutual benefit in a cooperative relationship. The two most common approaches to relationship contracting have been those of ‘partnering’ and ‘project alliancing’.

There was a surge of interest in partnering when it was first introduced into the Australian construction industry in the early 1990s (Ross 1999: 4).¹³¹ NADRAC (2011) defines partnering as a process that:

involves the development of a charter based on the participants' need to act in good faith and with fair dealing with one another. The partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem-solving and dispute resolution strategies.

¹³⁰ A body representing 20 of the nation’s leading construction contracting organisations.

¹³¹ According to Stehbins, Wilson and Skitmore (1999:197), partnering was conceived in the US in the early 1980's. It was formally introduced to Australia in 1992 via a series of seminars presented by Charles Cowan and sponsored by the Master Builders - Construction and Housing Association of Australia. Since then it has been used by both public and private industry, for both civil and building projects.

The foundation of the partnering approach is the mutual development at the outset of the contract by the project participants of a project charter, encompassing the aims of the project and of each of the participants (Eilenberg 2003: 145), which represents a commitment from each participant to act in the best interests of the project. Whilst there are a number of partnering approaches, which may vary in the degrees of commitment required from the project participants (Lenard et al 1996: 6), the project charter typically includes expectations of completion times and quality of work, and mechanisms for dispute minimisation (Eilenberg 2003: 145).

Jones (2006: 226) explains that, ‘The charter will be a document of “high order,”¹³² in which the integrity and honor of those involved is at stake rather than financial or legal penalties on the failure of the arrangement.’ As such, the partnering charter stands alongside the legally-binding contractual arrangements and is not, itself, intended to be a legally binding contract document (Lenard et al 1996: 11).

However, whilst the partnering charter may not have any legal contractual status, its existence may well influence how the court interprets the terms of the construction contract between the parties. As such, Lloyd J in the English High Court stated:

The terms of that document [ie, a partnering charter], though clearly not legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured.¹³³

Additionally, Dorter and Sharkey (2009: 3510-3514) consider that the existence of an agreed partnering charter between contracting parties may, depending on individual circumstances, potentially bring equitable considerations into play – particularly the issues of fiduciary duties and promissory estoppel. As Dorter and Sharkey (2009: 3512) state, ‘Just as equity arose as a gloss upon the common law, so the partnering charter gives rise to equitable glosses upon the black letter law of the construction contract.’

The project charter is usually drawn up after the completion of a workshop, or retreat, attended by representatives of the client, the architect, the various consultants, the

¹³² Citing Griffin (1994).

¹³³ *Birse Construction Ltd v St David Ltd* [1999] EWHC Technology 253 at [23].

contractor and all the subcontractors and the major suppliers (Eilenberg 2003: 145). A key characteristic of partnering charters is the establishment of a communications network that requires parties to resolve issues of conflict at the lowest possible level in the project hierarchy or, failing which, to escalate unresolved issues upwards in a timely manner in order to avoid causing lengthy and costly project delays (Eilenberg 2003: 151; Jones 2006: 226).

Whilst partnering has been beneficially used on a number of construction projects,¹³⁴ it has also failed to improve performance on some.¹³⁵ One of the most common causes of the failure of partnering has been cited as the failure to align contract terms and procedures with the partnering procedures (Tyrril 1997: 34; Jones 2006: 226). As stated by Dorter and Sharky (2009: 3510):

Fundamental and finally fatal is the failure to relate “philosophy”, “mindset” and “process” of partnering to the benefits, rights, obligations and liabilities of the parties under the contract. Accordingly, any such relationship is often a murky one, requiring careful legal (and even judicial) analysis.

In addition to partnering, the early 1990s saw the first use of a project alliancing approach to relationship contracting in the Australian construction industry.¹³⁶ Project alliancing, which has been described as the ‘high-water mark of relationship contracting’ (Jones 2006: 226), has become a particularly popular procurement approach for large public engineering construction projects in Australia over the past decade.¹³⁷

Project alliancing differs from partnering in that the cooperation of project participants, in order to attain a ‘best-for-project outcome’, is obtained by providing a contractual

¹³⁴ Ross (1999: 4) reports that partnering has ‘been used mostly on resource and infrastructure projects with some notable applications in the building sector’ in Australia.

¹³⁵ See, generally, Tyrril (1997).

¹³⁶ According to the Department of Treasury and Finance, Victoria (2006: 2), ‘Project alliances were first used in Australia to deliver major oil and gas projects in Western Australia in the early 1990s. They first emerged in the Australian public sector when Sydney Water used a project alliance to deliver the Northside Storage Tunnel Project in the late 1990s.’

¹³⁷ The Department of Treasury and Finance, Victoria (2009: 8) reports that the total value of projects using alliancing in the public sector increased from about \$1 billion in 2004 to about \$10 billion in 2009. In contrast, the total value of projects using alliancing in the private sector has remained fairly constant between 1996 and 2009 at a figure below \$0.5 billion.

‘framework for collaborating in an incentive-driven way’ (Thomas 2007: 329). Thus, rather than relying solely on the honour and commitment of the project participants to collaborate as in partnering, project alliancing aligns the financial interests of the project participants in order that they either all rewarded for project success or all punished for project failure.

Accordingly, Walker and Hampson (2003) state:

with partnering, aims and goals are agreed upon and dispute resolution and escalation plans are established, but partners still retain independence and may individually suffer or gain from the relationship. With alliancing the alliance parties form a cohesive entity, that jointly shares risks and rewards to an agreed formula ...

Thomas (2011) has considered whether project alliancing gives rise to fiduciary relations and, thereby, equitable relief. He concludes that, whilst this may be possible where it can be demonstrated that the alliance partners have placed a special degree of trust and confidence in each other,

since alliances are generally entered into between sophisticated commercial parties, neither of whom are typically vulnerable, a court should be wary of heeding a call for equitable relief based on the implication of fiduciary duties into the alliance relationship. (Thomas 2011: 365)

Key features of project alliancing include, amongst other things (Thomas 2007: 330; Ross 1999: 6):

- strategic governance of the project by a Project Alliance Board with senior representatives from all parties who carry full authority to bind the party;
- management of the project by an alliance management team whose members are assigned on a ‘best-for-project basis’;
- an express commitment to resolve issues within the alliance, and surrender rights to commence arbitral or court proceedings except in the case of ‘wilful default’ (a ‘no blame, no dispute’ agreement);
- a performance-based remuneration structure, whereby the owner agrees to pay project participants their direct costs and project-specific overheads, plus an additional at-risk

reward component which is payable to project participants in accordance with a set of pre-agreed key performance indicators (a ‘gain-share, pain-share’ strategy); and

- agreement to cost the project on an ‘open-book’ basis.

An extension of the project alliancing approach is strategic alliancing, ‘in which the parties conceive a long-term relationship that endures beyond any single project’ (Jones 2006: 227).

3.10.2 Dispute Boards (DBs)

A DB has been described by Loots and Charrett (2009: 286) as:

a panel of one or three suitably qualified and experienced independent persons appointed under the Contract. Its function is to become and remain familiar with the project at all stages, and to be available at regular intervals to confer with the parties to assist in the avoidance of disputes, or if necessary to provide a determination on a dispute referred to it.

Dispute review boards (DRBs) were the first type of DB to be used in the construction industry. The DRB concept originated in the United States on tunnelling and dam projects (Gerber 2001: 125).¹³⁸ Subsequently, other forms of DBs have been developed and employed on construction projects. These include dispute adjudication boards (DABs)¹³⁹ and combined dispute boards (CDBs).¹⁴⁰

Since the emergence of DRBs in the mid-1970s, DBs have been increasingly employed in the United States, and globally.¹⁴¹ Through to the end of 2006, it is estimated that over

¹³⁸ The first accepted use of a DRB was in 1975 on the second bore of the Eisenhower Tunnel in Colorado, USA (Dispute Resolution Board Foundation 2007: section 1.1).

¹³⁹ According to Gerber (2001: 127), DABs first appeared in the FIDIC contract in response to concerns about the role of the engineer (owner’s agent) in resolving disputes.

¹⁴⁰ In addition to DBs, dispute resolution advisors (DRA) have been employed as a type of DAP. The DRA model was developed by Colin Wall in Hong Kong in the late 1990s – for further details see, generally, Wall (1993).

¹⁴¹ According to Matyas et al (1996), as seen in Gerber (2001: 125), DBs are known to have been used on construction projects in Australia, Bangladesh, China, France, Hong Kong, India, New Zealand, South Africa, Sweden, Uganda, the United Kingdom and the United States. Additionally, DRBF (2007: section 4.2) reports that conditions of contract which require borrowers to have a DB for every contract for which any of the development lenders provide funding have been adopted by the following institutions: African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development

2,000 projects worth over US \$100 billion have used DRBs or DBs (Dispute Resolution Board Foundation (DRBF) 2007: section 1.3).

Although there are several models of DB, they all have common fundamental procedural characteristics with regards to managing conflict to avoid disputes, including:

- the collective appointment of standing neutrals (ie, the DB members), who should be independent and have relevant knowledge and expertise, to ensure procedural fairness;¹⁴²
- establishment at the outset of the construction contract, so as to be a readily accessible resource that the parties can access during the course of the project (Gerber and Ong 2011: 8); and
- an ongoing high degree of familiarity with the construction project by the standing neutrals through being actively involved during the construction process – eg, regular site visits, regular site meetings with the contracting parties, receiving copies of monthly reports and senior project control group meeting minutes (Peck and Dalland 2007: 19; Jones 2006: 226; Gerber and Ong 2011: 10).

The above characteristics of DBs enable the standing neutral(s) to contemporaneously identify issues, or potential issues, of conflict between the contracting parties. Such issues can be rapidly dealt with at, for example, a site meeting where both parties get a chance to air their grievances and negotiate under the facilitation and guidance of the standing neutral(s), who may steer the parties towards new understandings and thereby help clarify matters in contention (Peck and Dalland 2007: 19).

DBs allow for the parties to refer disputes to a hearing. At the hearing both parties get a chance to put their case.¹⁴³ The hearing is typically procedurally simple and quick – being,

Bank, International Bank for Reconstruction and Development (The World Bank), Islamic Bank for Development, and Nordic Development Fund.

¹⁴² See Gerber and Ong (2011: 9) for an explanation of the three most commonly used methods for DB member selection.

¹⁴³ Typically, as Coffee (1988: 60) describes, ‘Both parties make a presentation of the facts and specifications as they perceive them, with time available for the board to ask questions. The owner and the contractor have an opportunity to rebut the other’s statements.’

in nature, more like a site meeting than a trial (Gerber and Ong 2011: 13; Peck and Dalland 2007: 20). The various models of DB, however, differ in the way they deal with the outcome of the dispute resolution hearing (Gerber and Ong 2011: 8).

The outcome of a DRB hearing is a non-binding recommendation, whereas the outcome of a DAB hearing is an interim binding decision which may be overturned if one of the parties pursues the dispute to arbitration or litigation. CDB hearing outcomes are in the form of a recommendation unless a party requests a binding decision from the CDB, in which case the CDB has the discretion to issue a decision which is binding subject to being overturned in any subsequent arbitration or litigation (Gerber and Ong 2011: 15). Gerber and Ong (2011: 15) emphasise the benefit of non-binding recommendations in DAPs as they support, rather than supplant, negotiations between the parties, thereby transforming the adversarial culture that has historically plagued construction projects. Accordingly the Dispute Resolution Board Foundation (DRBF) (2007: section 1.3) reports that:

Increased use of advisory opinions has contributed to the avoidance of disputes. This process is inexpensive, rapid, informal, and is implemented prior to the parties becoming entrenched in adversarial positions. The reported success of advisory opinions is nearly 100%.

Regardless of which DB model is used, the immediate access to expert neutrals who are highly conversant with all aspects of the particular construction project offers a significant advantage over ADR and litigation, where the neutrals will have to study the claims submitted by both parties and attempt to understand the often complex facts, background and context underlying the dispute (Mohd Danuri et al 2010: 352). Furthermore, confident in the knowledge that the DB will fairly and swiftly resolve the dispute, the parties can focus their resources on progressing with the construction works unhindered by the acrimony so often resulting from traditional dispute resolution processes (Coffee 1988: 60; Gerber and Ong 2011: 11).

From their analysis of 810 projects¹⁴⁴ which had used DRBs in the United States, Menassa and Peña Mora (2010: 72-74) report that: 51% had zero disputes referred to DRB hearings and, on the 49% of projects where the DRB did hear disputes, over 90% of the disputes were settled with no further deliberations. Gerber and Ong (2010: 13) consider that the findings of Menassa and Peña Mora's (2010) analysis 'demonstrate that DRBs are not only an efficient and successful mechanism for avoiding disputes, but also an effective system of dispute resolution in the event that a dispute cannot be avoided.'

Similarly successful outcomes have been reported on Australian construction projects where DBs have been employed.¹⁴⁵ However, in marked contrast to the United States, the use of DBs in Australia has been very low. Gerber and Ong (2011: 18) report that, at the time, since the first use of a DRB in 1988, only 21 construction projects in Australia had used DRBs, and the DRB is the only DAP model to have been used in Australia. They attribute this lacklustre uptake in Australia to four principal barriers:

- (i) the lack of familiarity of practitioners with DBs in the Australian construction industry;
- (ii) the absence of clauses relating to DAPs in Australian standard forms;¹⁴⁶
- (iii) the commitment to relationship contracting as a system for managing conflicts and disputes; and
- (iv) the perception that the use of DRBs is very expensive, only suitable for projects in excess of AU\$50 million¹⁴⁷ (Gerber and Ong 2011: 18-27).

With respect to (iii) above, Gerber (2012: 62) elaborates:

¹⁴⁴ The project data used by Menassa and Peña Mora (2010) was obtained from the Dispute Resolution Board Foundation (DRBF) database. They selected projects undertaken in the United States as of 30 December 2007 for which they deemed complete and reliable data existed on the DRBF database.

¹⁴⁵ See Gerber and Ong (2011: 18), who quote from GM Peck's seminar at the *Dispute Boards: Lessons Learned Seminar* (Sydney, 10 April 2010), for statistics in this respect.

¹⁴⁶ As such, Gerber and Ong (2012: 16) recommend that 'an entirely new suite of contracts be drafted [in Australia], built on a solid foundation of dispute avoidance and early resolution.'

¹⁴⁷ Citing Charrett (2009: 14).

One of the reasons why DRBs and alliancing do not happily co-exist in any country may be that both alliances and DRBs are used on similar types of projects, meaning that they can be perceived as rivals.

Gerber (2012: 62), however, makes the point that ‘there is no reason why alliances and DRBs (along with other DAP models) cannot happily co-exist, with parties choosing which one is best suited for their particular project.’ Further, she advocates that DRBs and alliances could operate side-by-side on a construction project to provide an ironclad defence against disputes (Gerber 2012: 63).

3.11 Judicial Review and ADR Awards

Judicial review is traditionally understood to be concerned with whether decisions made by administrative tribunals are lawful. According to McClellan (2006: 4):¹⁴⁸

The fundamental principle of judicial review is that “all power has its limits,” and when administrative decision-makers act outside of those limits they may be restrained by the judiciary. Judicial review does not prevent wrong decisions, it instead prevents them from being made unjustly. It does not matter whether the judge who is reviewing the decision would him or herself have arrived at a different conclusion to the administrative decision-maker. The decision will only be interfered with if there was some illegality in the process by which it was made. The jurisdiction of the court is confined to quashing the decision and remitting the matter back to the original decision-maker for determination in accordance with the law.

In Australia, the superior courts at State level,¹⁴⁹ and the High Court¹⁵⁰ and Federal Court¹⁵¹ at Commonwealth level, have original jurisdiction to review administrative decisions. As such, they have the power to give remedies by way of orders traditionally known as ‘prerogative writs’.¹⁵² Of these writs, mandamus, prohibition, injunction, and

¹⁴⁸ Citing Aronson, Dyer and Groves (2004: 85).

¹⁴⁹ See, for example, the *Supreme Court Act 1970* (NSW), s 69.

¹⁵⁰ Conferred by the *Commonwealth of Australia Constitution Act* (Cth), s 75(v).

¹⁵¹ Conferred by the *Judiciary Act 1903* (Cth), s 39B(1).

¹⁵² In *Re Refugee Review Tribunal; ex p Aala* (2000) 204 CLR 82 at 92-3, the High Court of Australia considered that the term ‘constitutional writs’ was more accurate, given that the writs are referred to in the Australian Constitution, rather than the ancient English term ‘prerogative writs’ which arose from the royal prerogative.

certiorari, are the most commonly sought in relation to the actions of tribunals and public officials.

Mandamus, meaning ‘we command’, is a writ used to compel an authority to perform a public duty. Prohibition is a writ used to prevent a public authority from carrying out, or continuing, an act which exceeds its jurisdiction. Writs of injunction prevent, or require, certain actions in order to protect statutory rights and enforce statutory obligations of officials or others. Certiorari is a writ used to remove the official record of the impugned decision into the court making the order and then, if the action is found to have been unlawful, to quash the impugned decision (Administrative Review Council 2006: 10).

With the exception of injunctions, which may be available for non-jurisdictional errors, all of these writs are available only for errors that affect the jurisdiction or power to make a decision (including jurisdictional errors of law, as discussed further in Chapter 7.6.2). With respect to the concept of jurisdictional error, the Honourable Justice Garry Downes (2011: 6) states:

The common law rules relating to judicial review of administrative decisions are well established. They apply where administrative action is not authorised or where the decision-maker misunderstands the authorisation or exceeds it. They require a fair hearing, both through an unbiased decision-maker and a fair process. They require the decision-maker to act on all materially significant matters and not to ignore significant matters. The action must involve a real exercise of discretion and the power must be exercised *bona fide* [in good faith].

At Commonwealth level, the common law grounds for judicial review have been codified in the *Administrative Decisions (Judicial Review) Act 1977* (‘ADJR Act’), which gives the Federal Court statutory jurisdiction to undertake judicial review. According to Douglas (2002: 57), ‘both the procedure and remedies available under the ADJR Act are far simpler than at common law.’ Some of the States and Territories – namely ACT, Queensland, Tasmania and Victoria – have enacted parallel legislation to the ADJR Act (Downes 2007: 249; 2011: 10). In jurisdictions where judicial review legislation exists, judicial review at common law by way of orders in the nature of prerogative writs continues to be available in parallel to the statutory schemes (Downes 2007: 249).

The ADR methods used in the construction industry are agreed to in contract by the disputing parties. Where these methods, specifically arbitration and expert determination, are binding in nature, the parties agree to submit their disputes to a privately agreed tribunal for resolution, and are contractually bound to accept the decision of the agreed tribunal. Generally at common law there is no right for the parties to appeal, or contest, in court the determination resulting from any private ADR process, providing that determination has been duly conducted in accordance with the parties' ADR agreement. With respect to private commercial arbitration, which has been held by the courts to be a private ADR process,¹⁵³ albeit one with legislative support, Harper J states:

Those who choose to resolve their disputes by invoking the provisions of the Commercial Arbitration Act must take the good with the bad. They trade litigation, with its strict adherence to justice in accordance with law and its relatively generous rights of appeal, for a species of alternative dispute resolution with its advantages of speed and, possibly, cost – but with more limited rights of recourse to the courts thereafter. In short, they thereby take a step which limits the power of this Court subsequently to intervene.¹⁵⁴

Lord Hoffman expressed the relevant principle in the following terms:

The powers of the architect or arbitrator, whatever they may be, are conferred by the contract. It seems to me more accurate to say that the parties have agreed that their contractual obligations are to be whatever the architect or arbitrator [or adjudicator] interprets them to be. In such a case, the opinion of the court or anyone else as to what the contract requires is simply irrelevant. To enforce such an interpretation of the contract would be something different from what the parties had agreed.¹⁵⁵

A contractual provision to treat a private ADR determination as final and binding has the effect that the 'determination (assuming it was made in accordance with the contract) is the source of the parties' contractual rights and obligations.'¹⁵⁶ In other words, parties who have agreed to allow a third party to determine the content of their contractual obligations in the event of a dispute will be bound at common law to honour that determination.

¹⁵³ *Grocon Constructors v Planit Cocciardi Joint Venture (No. 2)* [2009] VSC 426 at [57].

¹⁵⁴ *Gunns Forest Products Pty Ltd v North Insurances Pty Ltd* [2004] VSC 155 at [2].

¹⁵⁵ *Beaufort Developments (NI) Ltd v Gilbert-Nash NI Ltd* [1999] 1 AC 266 HL at 273.

¹⁵⁶ *The State of NSW v UXC Limited* [2011] NSWSC 530 per Ball J at [41].

A private ADR agreement, however, cannot completely oust the jurisdiction of the courts,¹⁵⁷ as to do so would be contrary to public policy. As explained by the High Court of Australia:

No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them.¹⁵⁸

Keane (2010: 2) notes that there ought to be a role for the public courts to oversee the quality of private commercial decision making processes to the extent that such processes are free from illegality,¹⁵⁹ dishonesty or blatant incompetence (Keane 2010: 2).

Further, where the private process is regulated by legislation, the common law position may be supplemented or overridden by statute law. For example, as discussed below, by dint of the old uniform Domestic Commercial Arbitration legislation, the courts may review private commercial arbitration determinations for manifest errors of law on the face of the record¹⁶⁰ and a breach of the rules of natural justice,¹⁶¹ even though such reviews are unlikely to be permitted at common law.

This role of the courts is necessitated due to the autonomous nature of individual private ADR hearings and the consequent inability of private ADR processes to establish universal and binding ‘baseline’ rules of fairness. The Honourable Justice Steven Rares (2008: 249),¹⁶² in the context of private commercial arbitration, elaborates:

Courts have an important role to play which is complementary to arbitration. Courts systematise and explain the legal principles applicable in particular, as well as frequently occurring, situations

¹⁵⁷ Although it is possible at common law for parties to agree that the making of a private ADR determination be a condition precedent to the bringing of a court action – see *Scott v Avery* (1856) 5 HL Cas 811. However, as discussed in Chapter 3.4, this may be overridden by statute – see, for example, s 55 of the old uniform *Commercial Arbitration Acts*.

¹⁵⁸ *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652.

¹⁵⁹ See *Deutsche Schachtbau und Tiefbohr-Gesellschaft MBH v Shell International Petroleum Co Ltd* [1990] 1 AC 295; [1988] 2 All ER 833 per Sir John Donaldson, as cited by Victoria Bell (2008: 7).

¹⁶⁰ S 38(5) of the old uniform *Commercial Arbitration Acts*.

¹⁶¹ S 42(1)(a) and s 4(1) of the old uniform *Commercial Arbitration Acts*.

¹⁶² As seen in Keane (2010: 2).

faced by those involved in commerce ... Arbitrations cannot offer that perspective because they are conducted confidentially. And, no matter how eminent the arbitrator(s) may be, an award in one arbitration does not bind any other arbitrator or relationship between contracting parties.

It has been recognised that some degree of judicial review of ADR determinations is in the public interest.¹⁶³ As such, Victoria Bell (2008: 8) notes that ‘A dispute resolution mechanism without any recourse to the judicial system whatsoever would be unlikely to attract large commercial disputants.’

This need for judicial oversight of ADR, however, raises the question of ‘where the balance is to be struck between respect for the desire of commercial parties for speed, expertise and economy on the one hand, and the maintenance of necessary standards of fairness and competence on the other’ (Keane 2010: 2).

Under the old uniform Domestic Commercial Arbitration legislation (as discussed in Chapter 3.4.), commercial arbitration in Australia is expressly susceptible to judicial review on any question of law arising out of an award.¹⁶⁴ Where a party appeals on a question of law, the question of law must be one which could substantially affect the rights of one or more parties to the arbitration agreement,¹⁶⁵ and there must be a manifest error of law on the face of the award¹⁶⁶ (or other strong evidence that the arbitrator made an error of law).¹⁶⁷

Additionally, under the old uniform Domestic Commercial Arbitration legislation, the court has the power to set aside an award where the arbitrator has misconducted the proceedings.¹⁶⁸ Such misconduct includes a breach of the rules of natural justice,¹⁶⁹ and is discussed further in Chapter 3.12.3.

¹⁶³ For example, as cited by Victoria Bell (2008: 7-8), see: *Deutsche Schachtbau und Tiefbohr-Gesellschaft MBH v Shell International Petroleum Co Ltd* [1990] 1 AC 295; [1988] 2 All ER 833 per Sir John Donaldson; English Commercial Court Committee (1987: 7).

¹⁶⁴ S 38(2) of the old uniform *Commercial Arbitration Acts*.

¹⁶⁵ S 38(5)(a) of the old uniform *Commercial Arbitration Acts*.

¹⁶⁶ S 38(5)(b)(i) of the old uniform *Commercial Arbitration Acts*.

¹⁶⁷ S 38(5)(b)(ii) of the old uniform *Commercial Arbitration Acts*.

¹⁶⁸ S 42(1)(a) of the old uniform *Commercial Arbitration Acts*.

¹⁶⁹ S 4(1) of the old uniform *Commercial Arbitration Acts*.

As discussed in Chapter 3.4.2, it is widely believed that excessive judicial intervention by the courts in the arbitration process under the old uniform Commercial Arbitration legislation has contributed to its demise as an effective ADR process in the construction industry. Victoria Bell (2008: 9) notes that there were 88 applications for judicial review of arbitral awards under the *Commercial Arbitration Acts* in the period 2000 to 2006, 31 of which pleaded both error of law and misconduct.

Jones (2009: 5) cites the decision in *Oil Basins Limited v BHP Billiton Limited*¹⁷⁰ ('*Oil Basins*') as one such example of the effect of judicial intervention on arbitration procedure. In *Oil Basins*, the Victorian Court of Appeal upheld the trial judge's decision¹⁷¹ that a failure to include an adequate statement of reasons in the award by the Arbitral Tribunal constitutes both a manifest error of law on face of award,¹⁷² and technical misconduct¹⁷³ (as discussed further in Chapter 3.12.3). Consequently, after around 2 years in the court appeal process, the matter which had been originally decided in arbitration proceedings lasting approximately 3 years had to be completely reheard by a differently constituted arbitral panel (Sturzaker and Valsinger-Clark 2008: 40). Their Honours state in their judgment:

The arbitrators' decision in the present case called for reasons of a judicial standard. As with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision.¹⁷⁴

In relation to the *Oil Basins* judgment, Keane (2010: 4) comments that:

This strict approach equates the exercise of decision-making power conferred by private contract to the exercise of the adjudicative power of the State. That view is problematic, both as a matter of principle and practice.

¹⁷⁰ (2007) 18 VR 346. Hereafter referred to as *Oil Basins*.

¹⁷¹ In *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402.

¹⁷² Under s 38(5)(b)(i) of the old uniform *Commercial Arbitration Acts*.

¹⁷³ Under s 42(1)(a) of the old uniform *Commercial Arbitration Acts*.

¹⁷⁴ *Oil Basins Limited v BHP Billiton Limited* (2007) 18 VR 346 at [54].

In *Westport Insurance Corporation v Gordian Runoff Limited*¹⁷⁵ the High Court of Australia also found that inadequate reasons given by an adjudicator constituted a manifest error of law. In reaching this decision, however, the Court viewed that:

The reference in *Oil Basins* to the giving by the arbitrators in that dispute of reasons to a “judicial standard” and cognate expressions placed an unfortunate gloss upon the terms of s 29(1)(c) [ie, the statutory requirement for the arbitration award to include a statement of reasons for making the award]. More to the point were observations in *Oil Basins* to the effect that what is required to satisfy that provision will depend upon the nature of the dispute and the particular circumstances of the case.¹⁷⁶

The potential for judicial review under the new uniform Domestic Commercial Arbitration legislation appears to be more limited, being restricted to an exhaustive express list of specific circumstances.¹⁷⁷ These include: the incapacity of a party; invalid arbitration agreements; failure to provide proper notice of appointment of the tribunal or proceedings; illegitimate composition of the tribunal; excess of mandate; and conflicts with public policy¹⁷⁸ (Minter Ellison Lawyers 2010). The test for appealing against awards on questions of law is also narrower, requiring the decision of the tribunal on the question to be obviously wrong, or the question to be one of general public importance and the decision of the tribunal to be at least open to serious doubt.¹⁷⁹ Further, an appeal on a question of law must be made within 3 months from the date on which the party making the appeal received the arbitration award.¹⁸⁰

Unlike commercial arbitration, expert determination is not supported by legislation which expressly sets out grounds for judicial review. Thus, expert determinations cannot be appealed on the basis of non-judicial errors of law or fact,¹⁸¹ defined by Nettle JA as errors ‘in the exercise of a judgment, opinion or discretion entrusted to an expert.’¹⁸²

¹⁷⁵ (2011) 281 ALR 593.

¹⁷⁶ *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 281 ALR 593 at [53].

¹⁷⁷ See s 34 of the new uniform *Commercial Arbitration Acts*.

¹⁷⁸ An award that conflicts with public policy is one that has been affected by fraud or corruption or a breach of the rules of natural justice – see further Chapter 3.12.3.

¹⁷⁹ See s 34A(3)(c) of the new uniform *Commercial Arbitration Acts*.

¹⁸⁰ See s 34A(6) of the new uniform *Commercial Arbitration Acts*.

¹⁸¹ See *Holt v Cox* (1994) 23 ACSR 590 at 596-597.

¹⁸² *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd & Anor* [2006] VSCA 173 at [53].

As discussed in Chapter 3.7, the determination of an expert may generally only be impugned on the basis that the expert has acted outside the terms of the contract that made provision for his or her determination. As McHugh JA states:

In each case the critical question must always be: Was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether or not there is error in the discretionary judgment of the valuer. It is whether the valuer complies with the terms of the contract.¹⁸³

However, as Hunt (2008: 33-36) observes, it is possible for errors of law or fact to vitiate an expert's determination if such errors are jurisdictional, causing the expert's determination to stray outside the charter conferred on him or her by the contract. As Nettle JA puts it:

although mistake is not itself a ground for vitiation of a final and binding expert determination, a mistake may still be of such a nature that the resultant determination is beyond the realm of contractual contemplation — beyond anything which the parties may be supposed to have intended to be final and binding — and therefore susceptible to review.¹⁸⁴

In addition to jurisdictional errors of law or fact, the courts have indicated that it may be possible for an expert determination to be susceptible to judicial review for breach of natural justice where an expert chooses to follow a quasi-judicial procedure (as discussed further in Chapter 3.12.3).

Aronson, Dyer and Groves (2009: 152) observe that in applying the rules of natural justice to private decision making processes, the Australian courts have drawn heavily on precedents from the field of public law adjusted for context. As such, Chapter 3.12 proceeds to consider the judicial concept of natural justice (or, as it is now often called,

¹⁸³ *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336.

¹⁸⁴ *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd & Anor* [2006] VSCA 173 at [51].

procedural fairness) and the factors which effect the degree to which the rules of natural justice need to be applied by particular tribunals or decision-makers.

3.12 The Legal Concept of Natural Justice or Procedural Fairness

Whereas procedural justice was discussed in Chapter 2.7.2 above in the context of dispute system design, and its effect upon an individual's or group's level of satisfaction and behaviour, this section examines procedural justice, or procedural fairness, (sometimes referred to as 'natural justice') as a legal concept.

Traditionally, it has been a requirement of the common law that rules of natural justice be applied to the litigation process. More recently, the courts have held that the rules of natural justice also apply to administrative decision making. As stated by Mason J in *Kioa v West*:¹⁸⁵

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

Therefore, persons in whom such public decision making power is vested (usually by statute), such as judges and administrative tribunals, must generally at common law follow the rules of natural justice established by the courts if their decision is to be enforceable.

In contrast, in the absence of any express contractual or statutory provisions requiring their application, the courts have generally not been willing to imply that the common law rules of natural justice apply to private decision making procedures. For example, an employer who dismisses an employee is not, as a matter of common law, 'bound to act reasonably or to give reasons or accord the employee an opportunity to be heard.'¹⁸⁶

¹⁸⁵ (1985) 159 CLR 550 at 584.

¹⁸⁶ *Intico (Vic) Pty Ltd and Ors v Walmsley* [2004] VSCA 90 at [17].

On the other hand, as discussed in Chapter 3.11, the common law rules of natural justice may be imported into a private dispute resolution process by statute.¹⁸⁷ Further, there are indications from the courts that the common law rules of natural justice may sometimes be imported into a private dispute resolution process (as discussed further in Chapter 3.12.3) where the procedure adopted by the decision making body is of a judicial or quasi-judicial nature.

By the same token, a decision making body will not be required to apply any element of the common law rules of natural justice which the court interprets as having been excluded by legislation in the context of any relevant statutory scheme. Just as legislation may be interpreted to require elements of natural justice not implied at common law, so Parliament can express an intention that elements of natural justice that would otherwise be implied at common law not be observed.¹⁸⁸

There are two broad common law rules of natural justice: the rule against bias and the hearing rule. These rules are designed to ensure fair procedures are followed in the decision making process. In *Gas & Fuel Corporation of Victoria v Wood Hall Ltd*,¹⁸⁹ Marks J identified these two broad rules as follows:

There are two rules or principles of natural justice ... The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *nemo iudex in causa sua* [no-one should be a judge in their own cause]. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – *audi alteram partem* [hear the other side] ... each of the two principles may be said to have subbranches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done ... Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.

¹⁸⁷ For example: ss 42(1)(a) and 4(1) of the old uniform *Commercial Arbitration Acts*; ss 13, 18 and 34(b)(ii) of the new uniform *Commercial Arbitration Acts*; s 387 of the *Fair Work Act 2009*(Cth).

¹⁸⁸ *Annetts v McCann* (1990) 170 CLR 596 at 598.

¹⁸⁹ [1978] VR 385, at 396.

The application of the rules of natural justice to administrative decision making has been referred to by the court as ‘procedural fairness’. As Mason J stated in *Kioa v West*:¹⁹⁰

It has been said on many occasions that natural justice and fairness are to be equated ... And it has been recognized that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression “natural justice” has been associated, perhaps too closely associated, with procedures followed by courts of law. The developing application of the doctrine of natural justice in the field of administrative decision-making has been very largely achieved by reference to the presence of characteristics which have been thought to reflect important characteristics of judicial decision-making.

A denial of procedural fairness will generally lead to a decision being set aside by a court on the basis of ‘jurisdictional error’ (Manson and Howe 2006: 5).

3.12.1 The Rule Against Bias

Procedural fairness requires that a decision-maker should be impartial. It is, therefore, necessary that the decision-maker should not be, or appear to be, biased towards any of the disputing parties.

The rule against bias is based upon the two maxims that:

- no one should be a judge in his or her own cause,¹⁹¹ and
- justice must not only be done, but must be seen to be done.¹⁹²

The common law recognises that bias can occur in two forms during the decision making process:

- (i) Actual bias – where a decision-maker conducts themselves in a biased manner during the decision making process; and

¹⁹⁰ (1985) 159 CLR 550 at 583.

¹⁹¹ See *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HCL 759 at 793; 10 ER 301 at 315.

¹⁹² See *R v Sussex Judges; ex parte McCarthy* [1924] 1 KB 256 at 259; *Ebner v The Official Trustee in Bankruptcy* 205 CLR 337 at [6].

- (ii) Apprehended, or ostensible, bias – where, regardless of actual conduct, the decision-maker may be perceived to be biased as viewed against an objective standard.

Cases of actual bias are rare (Robinson 2003: 7; Head 2008: 204). They are clear cut and, thus, rarely need to become the subject of legal proceedings (Robinson 2003: 7). Where they are subject to legal proceedings, Head (2008: 204) notes that ‘success requires proof that the mind of the decision-maker was actually partial and not amenable to persuasion by any evidence’, which is a burden of proof ‘more difficult to satisfy than showing that a reasonable observer would perceive bias.’¹⁹³

Conversely, cases involving apprehended bias are not as straightforward and are very often litigated (Robinson 2003: 7). In *Ebner v The Official Trustee in Bankruptcy*¹⁹⁴ (*Ebner*), the High Court of Australia set out the following test for a breach of the apprehension of bias principle:¹⁹⁵

a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

Field (2001: 393-394)¹⁹⁶ notes, ‘As is inherent in the notion of the “reasonable apprehension” it is to the “hypothetical reasonable and fair-minded but informed observer” that the court looks.’ Merkel J elaborates that, ‘The observer must be treated as fully informed of the facts and circumstances constituting the association relied upon.’¹⁹⁷

¹⁹³ Citing *Gamaethige v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 424 at 442-443.

¹⁹⁴ 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [6].

¹⁹⁵ For further discussion of this principle by the High Court of Australia, also see: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294.

¹⁹⁶ Citing *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd, Qantas Airlines Ltd and Federal Airports Corporation* [1996] FCA 1308 per Merkel J at [68].

¹⁹⁷ *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd, Qantas Airlines Ltd and Federal Airports Corporation* [1996] FCA 1308 at [69].

In *Forge v Australian Securities and Investments Commission*,¹⁹⁸ the High Court of Australia further elaborated on the application of the apprehension of bias principle as follows:

In applying the apprehension of bias principle to a particular case, the question that must be asked is whether a judicial officer *might* not bring an impartial mind to the resolution of a question in that case. And that requires no prediction about how the judge will in fact approach the matter. Similarly, if the question is considered in hindsight, the test is one which requires no conclusion about what factors actually influenced the outcome which was reached in the case. No attempt need be made to enquire into the actual thought processes of the judge; the question is whether the judge might not (as a real and not remote possibility rather than as a probability) bring an impartial mind to the resolution of the relevant question.

In *Webb & Hay v R*,¹⁹⁹ Deane J identified four ‘distinct, though sometimes overlapping, main categories of case’²⁰⁰ where disqualification may occur due to the appearance of bias:

The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap the first ... and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third ... and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.²⁰¹

In *Ebner*,²⁰² the Court laid down the following test for the application of the apprehension of bias principle:

¹⁹⁸ (2006) 228 CLR 45, per Gummow, Hayne and Crennan JJ at [67].

¹⁹⁹ (1994) 181 CLR 41.

²⁰⁰ *Webb & Hay v R* (1994) 181 CLR 41 per Deane J at [12].

²⁰¹ *Ibid.*

²⁰² At [8].

Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

The apprehension of bias principle applicable to judicial officers also applies in much the same ‘rigorous’ manner to tribunals based upon the judicial model (Head 2008: 207; Morris 2006: 2).²⁰³

3.12.2 The Hearing Rule

The hearing rule requires that a party has ‘afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it.’²⁰⁴ As McHugh J puts it:

Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power.²⁰⁵

Whilst the rules of natural justice are considered indispensable to justice in litigation (French 2010: 3), the extent to which the hearing rule must be applied in administrative decision making will vary depending upon what is fair in all the circumstances of the particular case (Aronson, Dyer and Groves 2009: 519).

As stated by Tucker LJ in *Russell v Duke of Norfolk*,²⁰⁶ and approved by the High Court of Australia in *Mobil Oil Australia Pty Ltd v FCT*:²⁰⁷

²⁰³ Morris (2006: 2) cites *City of St. Kilda v Evindon Pty Ltd* [1990] VR 762, in which it was held that the former Administrative Appeals Tribunal of Victoria was subject to the same principles of natural justice in relation to bias as would apply to a court.

²⁰⁴ *O'Reilly v Mackman* [1983] 2 AC 237 per Lord Diplock at 279.

²⁰⁵ *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [123].

²⁰⁶ [1949] 1 All ER 109 at 118.

²⁰⁷ (1963) 113 CLR 475.

The requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.²⁰⁸

When considering the degree to which the rules of natural justice need to be applied in the particular circumstances of a case, the courts have referred to procedural fairness in terms of ‘practical justice’. As Gleeson CJ states in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,²⁰⁹ ‘Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.’

Accordingly, the Honourable Chief Justice Robert French (2010: 3) states, ‘In speaking about procedural fairness in administrative decision making, it is necessary to acknowledge, as the law does, that, as a practical matter, its content will vary according to context.’

For example, the Federal Court of Australia has found that:

in the absence of statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice. This is likely to be so where complex issues are involved or where the person affected by the decision is not capable of presenting his or her own case. In this sense, it may be said that in certain circumstances the “right to legal representation” is an element of natural justice.²¹⁰

Manson and Howe (2006) identify the following factors as relevant to the determination of what is required to satisfy the procedural fairness obligation, or to accord practical justice, with respect to the hearing rule:

²⁰⁸ Also see *Kioa v West* (1985) 159 CLR 550 per Mason J at 584-585.

²⁰⁹ (2003) 214 CLR 1 at [37].

²¹⁰ *Li Shi Ping and Liu Xiu Ling v Minister of Immigration, Local Government and Ethnic Affairs* [1994] FCA 1275 per Drummond J at [46].

- *The particular statutory regime.* In this respect, Manson and Howe (2006) cite Brennan J in *National Companies and Securities Commission v News Corporation Ltd*²¹¹ as follows:

The terms of the statute which creates the function, the nature of the function and the administrative framework in which the statute requires the function to be performed are material factors in determining what must be done to satisfy the requirements of natural justice.

The courts have made it clear that the common law rules of natural justice may be excluded from an administrative decision making process²¹² ‘by plain words of necessary intentment’ in the legislation.²¹³

- *The nature of the interest affected and the consequences of the decision for a particular person.* The more fundamental the nature of the interest and the graver the consequences of a decision, the more extensive opportunity a party should be given to be heard.²¹⁴
- *The urgency with which the decision must be made.* The more urgent the need to reach a decision by exercising the statutory power, the more likely it is that the requirements for natural justice can be reduced.²¹⁵
- *Whether it is an area of high-volume decision making.* In this respect, the then Justice French states: ‘courts should be reluctant to impose in the name of procedural fairness detailed rules of practice, particularly in the area of high volume decision making involving significant use of public resources.’²¹⁶
- *The existence of merits review or a ‘staged’ decision making process.* In this respect, Manson and Howe (2006) cite Aronson, Dyer and Groves (2004: 442-443) as follows:

²¹¹ (1984) 156 CLR 296 at 326.

²¹² See *Kioa v West* (1985) 159 CLR 550 at 584.

²¹³ *Annetts v McCann* (1990) 170 CLR 596 at 598.

²¹⁴ Citing *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78 at [117] per Weinberg J.

²¹⁵ Citing *Heatley v Tasmanian Racing and Gaming Commission* (1997) 137 CLR 487 at 513–515 per Aickin J; *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 241 per Wilcox J.

²¹⁶ *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 410-411.

in some cases at least, a preliminary decision may be considered to form part of a broader decision-making process, so that the provision of a hearing in the latter stages can be treated as satisfying the requirements of procedural fairness, or at least as reducing the content of those requirements at the preliminary stage. The general principle, we suggest, is that this should be permitted only to the extent that any significant adverse effects of the preliminary decision upon a person's interests can be substantially reversed or redressed at a later stage.

Manson and Howe (2006) further cite Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission*²¹⁷ as follows:

It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if “the decision-making process, viewed in its entirety, entails procedural fairness”.

3.12.3 Breaches of Natural Justice in Construction Arbitration and Expert Determination

Section 42(1)(a) of the old uniform Domestic Arbitration legislation expressly gives the Court the power to set aside an arbitrator's award where there has been misconduct on the part of an arbitrator. Misconduct is defined by the legislation as including corruption, fraud, partiality, bias and a breach of the rules of natural justice.²¹⁸ However, as noted by Miles CJ in *Holland Stolte Pty Ltd v Murbay Pty Ltd*:²¹⁹

the definition is not exhaustive and how far it encompasses “technical” misconduct in the sense of irregularity of procedure and the like is not clear. It may be that “even a mistake in procedure” will still be held to be misconduct if it results in a clear injustice ...²²⁰

²¹⁷ (1992) 175 CLR 564 at 578. Citing *South Australia v O'Shea* (1987) 163 CLR 378.

²¹⁸ S 4 of the old uniform *Commercial Arbitration Acts*.

²¹⁹ (1991) 105 FLR 304 at [16].

²²⁰ Citing *Harwood v. Civic Constructions Pty Ltd* (unreported, Supreme Court of New South Wales, 1 June 1990).

Further, in *Oil Basins Ltd v BHP Billiton Ltd*,²²¹ the Court stated that,

The expression ‘misconduct’ as used in relation to arbitration does not necessarily or indeed often involve moral turpitude on the part of the arbitrator. As was said in *Williams v Wallis and Cox*, ‘misconduct’ does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.

As such, Victoria Bell (2008: 10) observes that:

The courts regularly interpret the powers of review accorded to them under the *Commercial Arbitration Acts* in the broadest possible manner. The multifarious instances of judicial construction of new classes of ‘technical misconduct’, relying on sometimes vague notions of concepts of natural justice, is but one example.

Victoria Bell (2008: 12-13) gives examples of the many and various findings of technical misconduct by Australian courts which include, amongst other things: a failure to provide copies of submissions to all parties to the arbitration;²²² an arbitrator making his own enquiry as to the value of a piece of land;²²³ a failure to determine all issues pleaded;²²⁴ a determination of an issue by an arbitrator without allowing the parties to make submissions;²²⁵ and the imposition of a condition in the award by the arbitrator, without hearing submissions from the parties on the making of the condition.²²⁶ Additionally, as discussed in Chapter 3.11, a failure to include an adequate statement of reasons in the award by the Arbitral Tribunal has been held to constitute technical misconduct.²²⁷

²²¹ (2007) VR 346 at [76].

²²² Citing *Bunge (Aust) Pty Ltd v Crest Mills Pty Ltd* [1961] NSWLR 181; *Alexander Kans (Associates) Pty Ltd v Gonis* (Unreported, VSC, 19 April 1977).

²²³ Citing *Motrix Supplies Pty Ltd v Bonds & Kirby (Victoria Avenue)* (Unreported, NSWSC, Giles J, 12 September 1990).

²²⁴ Citing *Multiplex Construction Pty Ltd v International Golf Services Pty Ltd* (1988) 4 BCL 320; *Holland Stolte Pty Ltd v Murbay Pty Ltd* (1991) 105 FLR 304.

²²⁵ Citing *Corner v C & C News Pty Ltd* (Unreported NSWSC, Rogers J, 21 July 1989). Also see *Sugar Australia Pty Limited v Mackay Sugar Ltd* [2012] QSC 38.

²²⁶ Citing *De Martin & Gaparini Pty Ltd v Turner Corp Ltd* (Unreported, NSWSC, Giles J, 29 May 1992).

²²⁷ *Oil Basins Limited v BHP Billiton Limited* (2007) 18 VR 346.

Further, in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd*²²⁸ ('SASF Investment Trust') the Full Court of the Supreme Court of South Australia held by a majority that section 47 of the South Australian version of the old unified Domestic Commercial Arbitration legislation granted courts a supervisory jurisdiction over interlocutory orders with respect to procedural matters in arbitrations. The Court viewed that 'procedural justice requires that arbitrators should, in long complex arbitrations, follow as nearly as reasonably practicable the pre-trial pleading, discovery and other procedures of the court.'²²⁹

However, despite the *SASF Investment Trust* decision having been applied in subsequent decisions such as the Western Australian case of *Eastern Metropolitan Regional Council v Four Season Construction Pty Ltd*²³⁰ (Jones 2009), there have been conflicting judicial views regarding the scope of the courts' supervision of arbitral proceedings.²³¹ For example, in *Imperial Leatherware Pty Ltd v Macri & Marcellino*,²³² Rogers CJ stated:

I would venture to suggest that one reason why parties submit to arbitration is so that they should avoid "pre-trial pleading, discovery and other procedures of the court". This is so whether the arbitration is long and complex, or short and simple. The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a court are mimicked. Nor is there anything in the requirement to provide "procedural justice" which requires adoption of the pleadings and procedures of courts.

As mentioned in Chapter 3.11, the new uniform Domestic Arbitration legislation allows an arbitral award to be set aside by the Court where the award is in conflict with public policy.²³³ By reference to section 19 of the *International Arbitration Act 1974* (Cth), the Explanatory Notes to the *Commercial Arbitration Bill 2010* (NSW) state that:

²²⁸ (1990) 55 SASR 327. Hereafter referred to as *SASF Investment Trust*.

²²⁹ *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1990) 55 SASR 327 per White J at 329.

²³⁰ [1999] WASC 167.

²³¹ See, for example, *Imperial Leatherware Pty Ltd v Macri & Marcellino* (1991) 22 NSWLR 653; *Promenade Investments Pty Ltd v New South Wales* (1991) 26 NSWLR 184; *Leighton Contractors Pty Ltd v Kilpatrick Green Pty Ltd* [1992] 2 VR 505; *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors* [2010] VSC 123.

²³² (1991) 22 NSWLR 653 at 661.

²³³ See s 34(b)(ii) of the new uniform *Commercial Arbitration Acts*.

an award is in conflict with public policy if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award.

Further, the new uniform legislation provides grounds for challenging the appointment of an arbitrator which are limited to ‘expressions of partiality’ (Miles, Luttrell and McComish 2011),²³⁴ and requires that, ‘the parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party’s case.’²³⁵

The grounds for setting aside an arbitrator’s award under the new uniform legislation are, therefore, not subject to ‘the open-ended procedural connotations’ (Miles, Luttrell and McComish 2011) of s 42 (1)(a) of the old uniform legislation. As Miles, Luttrell and McComish (2011) state:

This elevates certainty of the arbitration over the need for strict compliance with arbitral procedure whilst permitting the more egregious examples of procedural unfairness to form the basis of a bias application.

An expert determination will be vitiated where the expert has engaged in misconduct in the form of fraud or collusion.²³⁶ The courts have generally held that there is no implied requirement for an expert to apply the rules of natural justice²³⁷ due to the informal nature of most expert determinations. However, where an expert chooses to adopt a quasi-judicial approach, the judiciary has indicated that it is likely that the rules of natural justice, to some extent, will apply. As Justice McHugh²³⁸ (2007: 18) states:

The fact that the person determining the issue acts as an expert and not as an arbitrator points against the rules of natural justice being generally applicable to expert determinations. That is

²³⁴ See s 12 of the new uniform *Commercial Arbitration Acts*. This section is informed by Article 12 of the *UNCITRAL Model Law on International Commercial Arbitration*.

²³⁵ See s 18 of the new uniform *Commercial Arbitration Acts*. This section is informed by Article 18 of the *UNCITRAL Model Law on International Commercial Arbitration*.

²³⁶ *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335; *Savcor v State of NSW* [2001] NSWSC 596 at [35].

²³⁷ For example, see *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8; *Owen Pell Limited v Bindi (London) Limited* [2008] EWHC 1420 (TCC).

²³⁸ Former Justice of the High Court of Australia.

because the decision maker is perceived to be not acting judicially or quasi judicially but as deciding the issue in question in accordance with that person's own expertise without any obligation to hear the parties. Nevertheless, in an expert determination, the expert is deciding an issue that affects the rights and obligations of the parties to the agreement. In a case where the expert is required to receive submissions from the parties, there is, I think, a strong case for saying that the Expert Determination is analogous to a quasi-judicial inquiry and that the rules of natural justice apply to such an expert determination.

Further, Einstein J considered:

Absent an expert code of conduct or contractual provision requiring adherence to procedural fairness, "the issue will be whether it was an implied term of the contract that the expert would follow fair procedures, which would be difficult to oppose in general terms, but the exact extent of the duty would always be controversial." It has been suggested that "[e]ven if the parties accept that the expert is not bound to decide on the basis of their submissions there is no reason why they should not expect fair procedures to be followed, for example in any conference that might take place."²³⁹

Despite the courts' intimation that the rules of natural justice might apply to circumstances where an expert adopts quasi-judicial procedure, there do not appear to be any clear or specific guidelines as to when private dispute resolution procedures become sufficiently quasi-judicial so as to attract the rules of natural justice.²⁴⁰

²³⁹ *Enron Australia Finance Pty Ltd (in Liquidation) v Integral Energy Australia* [2002] NSWSC 753 at [118]; citing Kendall (1992: 119-120) and Astor and Chinkin (1992: 136).

²⁴⁰ For instance, many employers adopt investigative procedures in the process of dismissing employees and this does not, in itself, import the common law rules of natural justice. On the other hand, see the comments of Ormiston J in *Intico (Vic) Pty Ltd & Ors v Walmsley* [2004] VSCA 90 at [3] as to why the nature of the employer/employee relationship may justify exemption from certain elements of natural justice.

Chapter 4

The Security of Payment Problem in the Australian Building and Construction Industry

4.1 What is the Security of Payment Problem?

The term ‘security of payment’ has become widely used in the Australian building and construction industry to refer to ‘the entitlement of contractors, subcontractors, consultants or suppliers in the contractual chain to receive payment due under the terms of their contract from the party higher in the contractual chain’ (NSW Government 1996: 41).

The Australian Procurement and Construction Council (APCC) (1999: 37) defines security of payment, in the context of best practice, as including a:

- responsibility on claimants for accurate and timely preparation, documentation and submission of claims,
- responsibility on each party to consider, process, pay and finalise claims in a reasonable and timely manner,
- requirement on each party to a claim to address, negotiate and settle any dispute in a reasonable, timely and cooperative way, and
- requirement by contractors, subcontractors, consultants and suppliers and employers to fulfil applicable industrial award and/or enterprise or workplace agreement or legislative requirements regarding their employees.

The security of payment problem refers to the difficulty which contractors may experience in receiving fair and timely progress payments for work carried out under a construction contract. The problem was referred to by Commissioner Cole (2003: Vol 8, 229), in the *Final Report of the Royal Commission into the Building and Construction Industry* (the ‘Cole Report’), as the ‘consistent failure in the building and construction industry to ensure that participants are paid in full and on time for the work they have done, even though they have a contractual right to be paid.’ According to Uher and Brand (2007: 765), ‘acts of arbitrary devaluation, late payment and non-payment of progress claims are

a persistent problem for those who perform construction work, or supply goods and services in the construction industry.’

After considering the evidence for a security of payment problem in Australia, this chapter discusses the reasons for its existence. The chapter concludes by considering the consequences of the problem for the construction industry.

4.2 The Evidence for a Security of Payment Problem in Australia

Several building and construction industry security of payment reviews in Australia (as listed in Table 4.1) have concluded that a significant security of payment problem has existed for some time,²⁴¹ and that this warrants government action (Royal Commission into the Building and Construction Industry 2002: 10). The problem is by no means unique to Australia, having been a persistent and long running issue for most of the construction industries in the British Commonwealth which adopted UK contracting practices.²⁴²

Several of these reviews, however, have not reinforced their anecdotal findings with statistical evidence due to difficulties associated with quantifying the size of the payment problem. The principal difficulty in this respect is that it has not been possible to extract from general records of bankruptcies and receiverships precisely how many could, amongst other causes, be attributed to a building and construction industry security of payment problem (WA Security of Payment Taskforce 2001: 9).

²⁴¹ According to Schwarten (2004: 70), ‘for several decades.’

²⁴² For this reason, as discussed in Chapter 6.10, security of payment legislation has been enacted in several international jurisdictions.

Table 4.1 – Australian Reviews into Security of Payment

(Adapted from Royal Commission into the Building and Construction Industry 2002: 10)

NOTE:

This table is included on page 101 of the print copy of the thesis held in the University of Adelaide Library.

The Tasmanian Review (Stenning and Associates 2006), however, presents some empirical evidence for the existence of a security of payment problem in the form of the results of:

- (i) an industry consultation with peak industry organisations;
- (ii) a broad based industry survey of construction business; and
- (iii) selected case studies.

The industry consultation revealed that of the fifteen industry organisations who responded, nine said that security of payments was an issue for their members. The industry survey indicated that some 43% percent of businesses surveyed reported, at the time, experiencing security of payment problems over the past financial year. With regard to these findings, the Tasmanian Review (Stenning and Associates 2006: 21) report observes that:

These findings are realistic, as there is no real evidence or rationale to suggest that the Tasmanian building and construction industry is structurally or operationally significantly different from that in other jurisdictions, other than with respect to matters of industry scale. Further, it is in keeping with:

- the findings of the Cole Royal Commission generally regarding the existence of security of payment problems in the building and construction industry nationally; and
- the assessment of nearly all mainland jurisdictions that have introduced legislative measures to assist in resolving the problem.

In order to understand the reasons for the existence of the security of payment problem, it is necessary to understand the structure and practices of the construction industry which have, left unregulated, encouraged late payment, payment devaluation and payment default practices.

4.3 Reasons for the Security of Payment Problem

Whilst security of payment problems are not unique to the building and construction industry, they are more prevalent in this industry than in others due to a combination of the:

- structure of the industry;
- risky financial environment of the industry;
- traditional payment provisions in construction contracts;
- potential difficulties in legally enforcing progress payments; and
- the traditional forms of dispute resolution, as discussed in Chapter 3, which have failed to provide a practicable process for contractors to recover progress payments.

These factors may, and often do, overlap to accentuate the security of payment problems both on and between specific construction contracts.

4.3.1 The Structure of the Building and Construction Industry

The structure of the building and construction industry has been identified as one of the primary causes of security of payment problems (Price Waterhouse 1996: 21). It has been described by Ms Alannah MacTiernan (2004: 274), in her Second Reading Speech for the *WA Construction Contracts Bill 2004*, as being ‘made up of many consultants, contractors, subcontractors and suppliers – all of whom work together to deliver buildings and infrastructure.’

Most of the physical building work on site in the construction industry is carried out by specialist trade subcontractors who are engaged, under contract, by head contractors. The APCC (1996: 1) note that subcontractors and suppliers provide 80-90% of trade work associated with construction projects.²⁴³ Head contractors are, in turn, contracted by building owners, or developers, to be ultimately responsible for the construction and delivery of the building. The principal service offered by head contractors is to organise and coordinate the work of their subcontractors, for which they are legally liable to the building owner.

²⁴³ In the UK construction industry, which has a similar structure to Australia’s, Jones and Saad (1998: 5) report that specialist subcontracting firms account for as much as 80% of contract expenditure on a construction project.

Subcontracting is endemic in the construction industry as it facilitates the most cost efficient method for contractors to engage specialised skilled labour. Subcontracting means that labourers can be hired on an as-needed basis, rather than as full-time employees. This suits the short term and intermittent nature of specialised trade work on site, and allows the avoidance of associated on-costs. Subcontracting firms range in size from sole traders and partnerships to substantial businesses or companies; although most are small specialised trade services firms.

In the commercial sector of the construction industry, contracts and subcontracts involving large sums of money (hundreds of thousands or millions of dollars) are commonly agreed. The scale and complexity of such contracts typically means that only the larger subcontracting businesses will be financially and technically capable of completing the works involved. The larger subcontractors, however, often only hire a limited pool of full-time employees and, therefore, need to engage further workers when they are awarded large contracts. Thus, large subcontracting companies will engage and manage their own sub-subcontractors, who may in turn employ and manage their own sub-sub-subcontractors. In this way, pyramidal, or hierarchical, contracting chains (as illustrated in Figure 4.1) are formed in which contractors are dependant for payment upon the contractors above them as money flows down through the chain.

NOTE:

This figure is included on page 105 of the print copy of the thesis held in the University of Adelaide Library.

Figure 4.1 – Illustrative Outline of the ‘Contracting Chain’ in the Building and Construction Industry
(Source: Stenning and Associates 2006: 9)

As at the end of June 2003, the Australian Bureau of Statistics (ABS) (2004) reported that 65% of all construction businesses earned less than \$100,000 in income, and a further 25% earned income between \$100,000 and \$500,000. Combined, these relatively small businesses accounted for around 19% of total industry income. In contrast, 0.03% of all construction businesses earned income of \$100m or more, and these businesses generated around 21% of total industry income. Subcontracting income accounted for around 34% of total industry income. Around 79% of all construction businesses, and 73% of the employment in the construction industry, were in trade services, which depended largely on subcontracting for its income. Of all trade services businesses, around 68% were earning an income of less than \$100,000.

Almost one third of the 716,200 persons employed in the construction industry, as at the end of June 2003, were working proprietors and partners of unincorporated businesses in the trade services sector (ABS 2004). Around 84% of these working proprietors and partners of unincorporated businesses were found in trade services, which had an average employment of only 1.08 persons per business. Notably, these small business proprietors and partners do not enjoy the protective legislative measures or trade union representation afforded to employees, particularly with regards to payment issues.

The myriad of contracting chains which exist on commercial construction projects means that, typically, a single large project could generate a plethora of interdependent contractual relationships, involving hundreds of contractors, over dozens of trades. As stated by MacTiernan (2004: 274):

This interdependence makes security of payment a vital foundation for the industry. Failure to pay at any link in the contracting chain can be disastrous to those subcontractors and suppliers who are waiting to be paid in their turn and, until now, there has been little recourse available to those who are affected.

Consequently, the parties that are most commonly affected by security of payment problems are smaller contractors in the lower tiers of the contracting chain.²⁴⁴

This point was reinforced by the Queensland Building Services Authority (QBSA) (2001: 7):

The financial failure of any one party in the contractual chain can cause a domino effect on other parties with those at the bottom most at risk in the event of a client or contractor defaulting. The collapse of one element of the contractual chain or the failure to pass on monies owed can create enormous financial strain on the other parties.

The higher up the contracting chain the weak payment link is placed, the more drastic the consequences are likely to be to the industry. As the APCC (1996: 1) notes, ‘The problems are worse when a participant higher in the contractual chain becomes insolvent, and when the sub-contractor is indebted to other sub-contractors and suppliers’ (See *Example 3* in Table 4.2).

Furthermore, security of payment problems may be caused on a particular project, even if cash has previously been flowing in a timely and fair manner on that project, due to payment problems which a contractor is experiencing on another project. Thus payment problems cascading down the contracting chain on one project have the potential to cross over to contracting chains on other projects (see *Example 1* in Table 4.2).

²⁴⁴ As discussed in Chapter 6.3, this is reflected in the Second Reading Speeches for the NSW, Victoria and Queensland Bills.

Table 4.2 – Illustrative Examples of Security of Payment Problems in the Building and Construction Industry

(Source: Royal Commission into the Building and Construction Industry 2002: 7)

NOTE:

This table is included on page 107 of the print copy of the thesis held in the University of Adelaide Library.

4.3.2 The Risky Financial Environment of the Building and Construction Industry

Unfortunately, contractors in the building and construction industry have tended to be more prone to fall into financial difficulties than in other industries due to the risky financial nature of doing business in the industry which is manifest in the following ways:

- (i) The cyclical nature of the industry, which means there are periods when more businesses are susceptible to financial problems (Royal Commission into the Building and Construction Industry 2002: 8).
- (ii) The project-based nature of the work, which means that for significant periods a large proportion of a firm's income can depend on the success of a few companies (Royal Commission into the Building and Construction Industry 2002: 8).
- (iii) The prevalence of tight profit margins in the construction industry (QBSA 2001: 7).
- (iv) Unethical conduct in the industry, such as deliberate late and/or underpayment of claims. Slow or disputed payment has been identified as one of the main security of payment issues (WA Security of Payment Taskforce 2001: 7). Contractors are more likely to resort to such behaviour, in an attempt to survive, when they are experiencing financial difficulties (see *Example 1* in Table 4.2). There is obvious financial advantage to be gained for principals by retaining as much of any progress payment monies as they can for as long as possible. As Uher and Brand (2005: 475) note, delaying payments or reducing their amount are tactics used by organisations higher up in the supply chain which are largely designed to enhance their positive cash flow at the expense of subcontractors lower down in the contracting chain.
- (v) The existence of poorly capitalised firms,²⁴⁵ which are not financially resilient (APCC 1996: 1), and have little in the way of assets that may be liquidated in the event of insolvency in order to pay creditors (see *Example 3* in Table 4.2).
- (vi) The inadequate business acumen of many, particularly smaller, contractors (WA Security of Payment Taskforce 2001: 8; Price Waterhouse 1996: 21). As the WA Security of Payment Taskforce (2001: 7) states:

There is anecdotal evidence to suggest that one of the main payment issues in the commercial construction industry is insolvency as a result of naïve business practice and persistent under-quoting on jobs.

²⁴⁵ Which the WA Security of Payment Taskforce (2001: 7) attributes to the low capital costs of setting up in business, and some businesses seeking to limit liability through the use of 'two dollar' companies and trust structures.

These financial characteristics of the industry mean that many contractors are financially frail, and susceptible to insolvency. As the QBSA (2001: 7) observes:

Extremely tight margins in the industry, restricted cashflows and payment default can force contractors to carry bad debts, or, if the burden of debt becomes too much, force such contractors into some form of insolvency.

Insolvency of a contractor typically results in its subcontractors, who are unsecured creditors, receiving a fraction of the money owing to them (Cole 2003: Vol 8, 231). This, in turn, is likely to lead to unpaid subcontractors breaching payment obligations in contracts with their own subcontractors and suppliers or, in the worst case, becoming insolvent themselves. As such, the security of payment problems created by the insolvency of one contractor spread out through the entire contracting chain below. The combination of the industry's contracting chains and its risky financial environment means that it has the highest number of insolvencies out of any single industry in Australia. In 2010/11, there were 1,862 construction insolvencies in Australia, which constituted 23% of all Australian insolvencies (Australian Securities and Investments Commission 2011).

4.3.3 Payment Provisions in Construction Contracts

Due to the typically lengthy nature and significant financial value of most commercial construction projects, it is customary for standard forms of construction contract to provide for regular interim progress payments to be independently certified and paid to the building contractor on account of the final contract sum as the project progresses. Progress payments are provisional in nature and, thus, subject to adjustment at the end of the contract.²⁴⁶ They avoid the requirement for a building contractor to have to finance the whole, or significant portions, of the construction works.²⁴⁷ Additionally, progress

²⁴⁶ *Lamprell v Guardians of the Poor of the Billericay Union* (1849) 18 LJ Ex 282; *Tharsis Sulphur and Copper Co v M Elroy* (1878) 3 App Cas 1040; *A-G v McLeod* (1893) 14 LR (NSW) 246; *Re Sanders Construction Pty Ltd and Eric Newham (Wallerawang) Pty Ltd* [1969] Qd R 29 at 39; *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd* (1995) 129 ALR 308.

²⁴⁷ The contractor will, therefore, not have to pass on the costs of such financing (which may include a premium for associated administration and risk) to the employer in their tendered contract sum.

payment provisions circumvent the common law principle of entire obligation,²⁴⁸ facilitating a regular flow of cash to the contractor in order to sustain the contractor's business. All standard forms of construction contract in Australia expressly provide for such interim progress payments.²⁴⁹ Such interim progress payment terms are usually mirrored in standard forms of subcontract conditions between head contractors and their subcontractors, particularly if companion standard subcontract conditions are used from the same suite of contracts as the standard form of head contract being used by the head contractor and building owner.²⁵⁰

Standard forms of subcontract conditions, however, are not much used for the engagement of smaller trade contractors in the lower ranks of a project's contracting chain, who may typically be sole business proprietors working on their own account. As Fenwick Elliott (2010: 2) observes:

It is certainly true that ... head contracts frequently provided for an architect or engineer to act as certifier, but there was no history of any such arrangements being applied down the contractual chain to the case of subcontracts, where individual tradesmen were in any position analogous to employees.

Instead these smaller trade contractors are often engaged under contractual terms drafted by their own principal, who is likely itself to be a trade contractor one tier above in the project's contractual hierarchy. Relationships between contractors and their subcontractors, particularly in the lower ranks of the contracting chain, are likely to be characterised by inequality of bargaining power due to the commercial reliance of the subcontractor on their principal for repeat business. As such, contractual payment terms are likely to favour the principal, and may not even provide for regular, independently certified progress payments.

²⁴⁸ See *Cutter v Powell* (1795) 6 TR 320. The entire obligation principle requires that a party must completely perform its contractual obligations in order to be discharged from the contract and be legally entitled to the promised consideration from the other party.

²⁴⁹ See, for example: AS 2124–1992, clause 42; AS 4000–1997, clause 37; ABIC MW-1 2003, Section N; PC-1 1998, clause 12.

²⁵⁰ For example: standard subcontract conditions AS 2545–1993 which are designed to accompany AS 2124–1992; and standard subcontract conditions AS 4901–1998 which are designed to accompany AS 4000 in Australia.

Most of the standard form conditions used in Australia²⁵¹ contain similar progress payment terms in that they provide for:

- regular progress payment claims (usually monthly) to be submitted by the contractor to a contract administrator²⁵² by dates agreed in the contract;
- the issuance by the contract administrator, pursuant to receiving the progress claim, of a progress payment certificate to the principal and contractor within a specified period of time,²⁵³ evidencing his or her opinion of the moneys due from the principal to the contractor; and
- payment of the certified amount by the principal within a specified period of time.²⁵⁴

Typically, the value of progress payment certificates is calculated to include:

- the value of construction work, including any approved variations to the contract documents, executed up to the contractually agreed date for submission of the progress claim;
- the cost of unfixated plant and materials which have been paid for by the contractor;²⁵⁵ and
- any other amounts due under the contract as between the principal and the contractor (eg, liquidated damages for late completion, or the costs of employing others to rectify defective works which the contractor has failed to rectify).

²⁵¹ And, indeed, the British Commonwealth countries.

²⁵² The title varies according to the form of contract. The contract administrator is referred to as the architect, engineer or superintendent by various standard forms of construction contract.

²⁵³ For example, AS 2124–1992, clause 42.1 requires the superintendent is to issue an interim payment certificate within 14 days of receiving the contractor’s progress claim.

²⁵⁴ For example, AS 2124–1992, clause 42.1 requires the principal to pay the amount due within 28 days after receipt by the superintendent of the contractor’s progress claim or within 14 days of the issue of the certificate, whichever is earlier.

²⁵⁵ Most standard forms of contract conditions provide for specified preconditions to be met by the contractor before payment for unfixated plant and materials is allowed. Such preconditions are to ensure that there can be no dispute as to the passing of ownership of such plant and materials to the principal, particularly in the event of the contractor’s insolvency. See, for example: AS 2124–1992, clause 42.4; AS 4000–1997, clause 37.3; and PC-1 1998, clause 12.10.

Most standard forms of contract conditions require that the contract administrator give reasons for any difference between the contractor's payment claim and the amount certified.²⁵⁶ Progress payments are invariably vital to the financial survival of most smaller and medium sized contractors who typically have very little capital, or capital backing, and are dependent upon timely and equitable payment in order to maintain a positive cash flow.

Although such certification processes have been provided for in building contracts for well over 100 years (Davenport 2007: 12), their effectiveness has often been brought into question due to:

- the inclusion in building contracts of unfair payment provisions; and
- the dual role of the contract administrator under standard forms of construction contract, acting both as the principal's agent and independent certifier.

Unfair Payment Provisions

Contractors have generally been able to use their superior bargaining position to insist on the inclusion in construction contracts of payment clauses which are favourable to themselves at the expense of their subcontractors.

According to the WA Security of Payment Taskforce (2001: 8), by virtue of their position in the contracting chain, subcontractors and suppliers are effectively made to finance construction by techniques such as the extension of credit and payment terms in subcontracts and supply contracts further down the supply chain. For example, if a head contract provides for payment in 28 days, the subcontract may provide for 60 or 90 days. This allows enough time for the head contractor to prepare and submit its progress claim and receive payment from its principal before having to pay its subcontractors, thereby reducing the risk of negative cash flow to the head contractor.

²⁵⁶ See, for example: AS 2124-1992, clause 42.1; AS 4000-1997, clause 37.2; and ABIC MW-1 2003, clause N4.

Contractors may, and have frequently been known to, eliminate the risk of negative cash flow altogether by the use of ‘pay when paid’²⁵⁷ or ‘pay if paid’ clauses in subcontracts.

Pay when paid clauses provide that a subcontractor is not entitled to be paid for its work until the ‘employing contractor’²⁵⁸ receives payment from its principal.

Pay if paid clauses provide that a subcontractor is only entitled to be paid that portion (if any) of its claim, and no more, which the employing contractor has been paid from its principal. In other words, if the employing contractor is not paid by its principal, the subcontractor is not entitled to be paid.

Such conditional payment clauses have been described as inequitable and unfair in nature (Iemma 1999: 1596; Stenning and Associates 2006: 10), because they make the head contractor’s payment obligations to its subcontractor dependent upon the actions of a third party (ie, the head contractor’s principal), over which the subcontractor has no control. Further, as noted by the WA Security of Payment Taskforce (2001: 8), the inclusion of such terms is a practice which is:

particularly objectionable to subcontractors because the head contractor is under no commercial pressure to seek payment from the owner, and privity of contract prevents the subcontractor from taking action against the owner directly.

As such, subcontractors are obliged to bear the risk of any breaches of progress payment obligations in the contract between the head contractor and its principal, to which the subcontractor is a third party.

The Law Reform Commission of Western Australia (1998: 89) further criticises pay if paid clauses because:

- The subcontractor bears the risk of the owner’s liquidity even though it might not be reasonable to expect the subcontractor to inquire into the financial position of the owner, a participant in the project with which it has no contractual relationship ...

²⁵⁷ Also sometimes referred to as ‘pay after paid’ clauses.

²⁵⁸ ‘Employing contractor’ refers to the contractor who engaged the subcontractor in a contractual relationship. ‘Employing’ is not used here in the sense of an employer-employee relationship.

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- The payment may depend on a condition over which the subcontractor has no control. For example, in *Dunlop & Ranken Ltd v Hendall Steel Structures Ltd, Pitchers Ltd (Garnishees)*²⁵⁹ the court held that a payment did not have to be made where the contract provided for payment to be made on the receipt of an architect's certificate under the head contract but one certificate from the architect had not been issued.
- A head contractor may rely on its own wrong, for example, where the owner is entitled to set-off against it in relation to the project contract, to defeat a bona fide claim by a subcontractor.
- Pay if paid clauses prevent a subcontractor from claiming on a bond or trade indemnity insurance policy. The surety or insurer may defend the claim for payment on the ground that the payment is not due to the subcontractor until the head contractor has been paid by the owner.²⁶⁰
- A subcontractor could not reasonably be expected to take the risk of non-payment into account in fixing the price for its portion of the work ...

The Dual Role of the Certifier

The success of any independent certification process depends upon the legal duty of a certifier to act in an unbiased manner by giving due regard to the interests of both the contractor and the principal.

In *London Borough of Hounslow v Twickenham Garden Developments Ltd*,²⁶¹ Megarry J stated:

under a building contract the architect has to discharge a large number of functions, both great and small, which call for the exercise of his skilled professional judgment. He must throughout retain his independence in exercising that judgment ... It is the position of independence and skill that affords the parties the proper safeguards and not the imposition of rules requiring something in the nature of a hearing.

In *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd & Bruce Henderson Pty Ltd*,²⁶² Byrne J explained that a certifier acts fairly and impartially

²⁵⁹ [1957] 1 WLR 1102.

²⁶⁰ Citing *Trade Indemnity Australia Limited v Parkinson Air-Conditioning Pty Ltd* (1994) 13 ACLR 19.

²⁶¹ [1971] 1 Ch. 233 at 259-260.

where they have regard to the interests of both the Builder and Proprietor, and that, ‘These interests are served by a certifier making decisions which are professional, careful and even-handed, not in the interests of any one party.’

In practice, the certifier is likely to be a private consultant, for example an architect or engineer, engaged by the building owner and acting as the contract administrator. Such a consultant is expected to wear ‘two hats’ under the construction contract: as their client’s agent and as certifier. As agent, the contract administrator carries out certain administrative functions on behalf, and in the interests, of their principal. Such administrative functions include: issuing variations to the contract works, issuing instructions to the contractor, issuing design information to the contractor, and attending site meetings. As certifier, the contract administrator exercises certifying functions which must be carried out fairly and independently. Such certifying functions include: assessing extensions of time, estimating liquidated damages, valuing the work done and materials supplied by the contractor in order to issue a payment certificate, valuing any extra costs of delay payable to the contractor, and giving decisions on disputes between the employer and contractor.

Most contemporary standard forms of construction contract expressly provide that the principal shall ensure that the contract administrator exercises his or her functions under the contract honestly and fairly.²⁶³ Further, the courts have held that in the absence of such an express term, an implied term exists that the contract administrator will ‘act fairly and justly and with skill to both parties to the contract.’²⁶⁴ Therefore, if a contract administrator is found to have acted in a biased or unfair manner when carrying out their certifying duties, this will constitute a breach of contract for which the principal will be liable.

The dual role of the consultant acting as contract administrator was summed up by Lord Radcliffe in *Burden Limited v Swansea Corporation*²⁶⁵ as follows:

²⁶² [1996] 13 BCL 235 at [29].

²⁶³ For example, see: AS 2124–1992, clause 23; AS 4000–1997, clause 20; and ABIC MW-1 2003, clause A6.3.

²⁶⁴ *Pernini Corp v Commonwealth of Australia* [1969] 2 NSW 530 at 536.

²⁶⁵ [1957] 1 WLR 1167 at 1172.

it is obvious that his general function is to act on behalf of the owner, and he is the owner's agent to give the required instructions to the contractor. He is placed in office to protect the owner's interests. But in those parts of his duties which relate to the giving of certificates for payment, I think that he stands apart from the owner and enjoys to some extent an independent authority of his own.

At first sight, such a dual role would seem to present an inherent problem, in that the contract administrator may experience a conflict of interest between their obligation to act neutrally in matters of certification and their role as private consultant to act in the contractual and financial interests of their paymaster. As stated by Gerber and Ong (2011: 7):

Regardless of whether the contract contains an express or implied provision regarding a duty to act impartially as between the parties, there remains a common perception amongst contractors that the superintendent consciously or subconsciously prioritises the rights and interests of the person who pays its fees – that is, the principal.

Nevertheless, as mentioned above, independent certification by an architect or engineer has formed the basis of payment mechanisms in standard forms of construction contract for well over 100 years. The majority of such standard forms, which have been commonly used in the construction industry, are well balanced, having been jointly drafted by bodies or organisations representing both parties. It may, therefore, be reasonably argued that parties within the industry have, for a long time, been content with the operation of such freely agreed contractual certification mechanisms.

Prior to the 1974 decision of the House of Lords in *Sutcliffe v Thackrah*,²⁶⁶ there was a view reflected in many decided cases that the certification role of the architect as contract administrator was quasi-judicial in nature, thereby giving the certifier immunity from actions for negligence.²⁶⁷ In *Sutcliffe v Thackrah*, however, the court overturned this view, finding that the architect, who caused loss to its client by overvaluing a series of payment

²⁶⁶ [1974] AC 727.

²⁶⁷ See *Chambers v Goldthorpe* [1901] 1 KB 624; *Arenson v Arenson* [1973] Ch 346 at 370.

certificates, owed a duty of care towards its principal with respect to certifying duties.²⁶⁸ As Lord Reid,²⁶⁹ stated:

The building owner and the contractor make their contract on the understanding that in all such [certifying matters] the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill, but also reach such decisions fairly holding the balance between his client and the contractor.

As discussed in Chapter 4.3.4, however, the courts have been more reluctant to find that a contract administrator can be liable in negligence to a contractor for undervaluing a payment certificate.

4.3.4 Challenging the Valuation of Payment Certificates

A contractor who believes that an interim payment certificate has been undervalued by a certifier may, depending on the circumstances, have up to three potential causes of action available at common law. All of these, however, require recourse to court or arbitration proceedings which, as discussed in Chapters 2.2.1 and 3.4.2, are typically too lengthy and costly for most contractors to pursue.

The three potential courses of action, which are discussed further below, are for:

- breach of contract;
- negligence; and
- fraud, or deceit.

Breach of Contract

Firstly, a contractor who believes that a payment certificate has not been correctly valued in accordance with the contract terms may bring an action in court, or initiate an agreed process of arbitration, to have the certificate set aside for breach of contract. If such an

²⁶⁸ See also *Wessex Regional Health Authority v HLM Design Ltd* [1994] CILL 991, where the contract administrator was found to owe a principal a duty of care with respect to the granting of extensions of time.

²⁶⁹ *Sutcliffe v Thackrah* [1974] AC 727 at 737.

action is successful, the court will come to a judgment as to the correct amount owing, and make an order accordingly.²⁷⁰ As stated by Ipp J in *WMC Resources Limited v Leighton Contractors Pty Ltd*:²⁷¹

where a certified valuation is to be made by reference to fixed, objective, criteria (such that there is no discretionary element in the valuation) there will only be one uniquely correct value. If the certifying valuer, in these circumstances, arrives at the incorrect value, the valuation will be in breach of the contract. It is for that reason that an incorrect certificate will also be set aside. The court will then have the jurisdiction to determine the correct amount owing in terms of the contract. Where there is an arbitration clause that gives the arbitrator jurisdiction to hear the merits of the claim, the arbitrator will have the same powers as the court: *Prestige & Co Ltd v Brettell* [1938] 4 All ER 346 at 350 and 354, *Neale v Richardson, Brodie v Cardiff Corporation*.

Further, it is well established that if an incorrect valuation occurs as a consequence of a certifier's bias towards the principal, due to pressure exerted by the principal, the certifier's judgment may be held invalid and set aside.²⁷² As discussed in Chapter 4.3.3, most construction contracts contain either an express or implied provision requiring the contract administrator to act impartially when exercising their functions under the contract. Thus, a principal who successfully exerts pressure on the contract administrator to unfairly promote its own financial position under the contract²⁷³ will be liable for breach of contract. As stated by Lord Radcliffe in *Burden v Swansea Corporation*:²⁷⁴

In the exercise of his [architect's] right and duty to issue interim certificates for payment he is so far distinct [from the employer or principal] that any act of the employer which interferes or obstructs him in that duty is a breach of contract which goes to the root of the whole engagement.

²⁷⁰ *WMC Resources Limited v Leighton Contractors Pty Ltd* [1999] WASCA 10 at [17].

²⁷¹ [1999] WASCA 10 at [18].

²⁷² See *Page v Llandaff and Dinas Powis Rural District Council* (1901) 2 HBC 316; *Hickman & Co v Roberts* (1913) AC 229.

²⁷³ For example, see *Lucas Stuart v Hemmes Hermitage* [2009] NSWSC 477 at [16], where the certifier yielded decision-making authority to the principal.

²⁷⁴ [1957] 1 WLR 1167 at 1172.

Negligence

Secondly, a contractor may attempt to bring an action in tort for negligence²⁷⁵ against the certifier on the basis that the certifier has caused economic loss to the contractor by breaching a duty of care owed to the contractor to act fairly and impartially in carrying out its certifying functions under the contract. However, it has proved difficult for plaintiff contractors to succeed in an action against a contract administrator for negligent undercertification of progress payments.²⁷⁶

In *Pacific Associates Inc v Baxter*²⁷⁷ (*'Pacific'*), the English Court of Appeal held that the engineer, acting as certifier under the contract, did not owe a legally enforceable obligation to the contractor in the circumstances to act fairly under the contract when certifying payment claims. Key to this decision was the contractual relationship between principal, contractor and engineer, and the existence of an arbitration clause in the contract which provided a mechanism for opening up a certificate to review. The Court of Appeal considered that, via arbitration, the contractor had a contractual path open to recover allegedly undercertified amounts from the principal, who could in turn recover the amount awarded to the contractor by taking action against the engineer for breach of contract.

In *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd & Bruce Henderson Pty Ltd*,²⁷⁸ the Supreme Court of Victoria followed *Pacific* and found that the architect did not owe the builder a duty of care to act fairly and impartially in carrying out payment certification functions under the contract, in circumstances where an experienced and well known builder had negotiated a modified standard form contract with a principal who had received legal advice, and the contract administrator (an architect) had twelve years of experience. In considering whether a duty existed, Byrne J stated:

²⁷⁵ Of the kind first established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. See, generally, Cremean, Shnookal and Whitten (2004: Chapter 16).

²⁷⁶ See *Leon Engineering & Construction Co Ltd v KA DUK Investment Co Ltd* (1989) 47 BLR 139; *Pacific Associates Inc v Baxter* [1990] 1 QB 993; *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd & Bruce Henderson Pty Ltd* [1996] 13 BCL 235.

²⁷⁷ [1990] 1 QB 993.

²⁷⁸ [1996] 13 BCL 235.

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It involves an examination of the terms of the building contract notwithstanding that the Architect is not a party to it ... In my opinion, it is clear from [the provisions of the contract] that the question of the rights and remedies of the Builder for acts and decisions of the Architect were considered by the Builder and Proprietor, and in many cases, dealt with by making the Builder responsible in some cases for loss suffered as a consequence of those decisions, and by giving to the Proprietor the responsibility of supporting them upon review before the Court or before an arbitrator if it so chose, and at its own risk for an order of costs.²⁷⁹

Despite such decisions, however, the avenues of negligence do not appear to be totally closed for a contractor wishing to recover damages with respect to undercertification due to

the view that the decision in *Pacific Associates* turned on the particular circumstances of that case and that the court should approach each case in which negligence is alleged by considering the particular circumstances said to establish a duty of care.²⁸⁰

Nevertheless, it seems, following *Pacific*, unlikely that a certifier under most Australian standard forms of building contract would be found to owe a duty of care to a contractor to act fairly and impartially in certifying payments. This is because most standard forms expressly provide for the principal to ensure that the certifier acts honestly and fairly (see Chapter 4.3.3) and for any disputes regarding payment certificates²⁸¹ to be referred to arbitration, or some other form of dispute resolution.²⁸²

Fraud or Deceit

A third possibility is for the contractor to bring an action in the tort of deceit, or fraud, against a certifier. If successful, this would invalidate the certificate.²⁸³ However, such actions are rare due to the seriousness of the allegation and the associated high standard of proof required.

²⁷⁹ *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd & Bruce Henderson Pty Ltd* [1996] 13 BCL 235 at 29.

²⁸⁰ *Multiplex Constructions v SOR Pty Ltd* [2000] SASC 414 per Duggan J at [24], citing Cole J in *P & E Phontos Pty Ltd v McConnell Smith & Johnson Pty Ltd* (1993) 9 BCL 259.

²⁸¹ With the exception of PC-1 1998.

²⁸² See, for example: AS 2124–1992, clause 47; AS 4000–1997, clause 42; and ABIC MW-1 2003, clause P1.

²⁸³ See *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 per Denning LJ at 712.

4.3.5 Potential Difficulties in Enforcing Progress Payments

An interim progress payment claim made under a construction contract does not of itself create a legally enforceable debt in favour of the contractor. However, once a payment certificate has been issued by the contract administrator pursuant to the claim, the certified amount becomes a debt under the contract and, where the principal does not duly pay the certified amount, the contractor may enforce payment by way of an application for summary judgment in court.²⁸⁴ If summary judgment is permitted, the court may make a determination on the case without the need for a full trial. Thus, the expense and delay associated with a full trial can be avoided.²⁸⁵ Additionally, summary judgment may be available to a contractor for the full amount of the payment claim where the contract administrator either issues a payment certificate after the contractually stipulated deadline,²⁸⁶ or does not issue an interim payment certificate at all.²⁸⁷

The Australian courts, however, have traditionally been cautious in their award of summary judgment, due to the possible detrimental effects of such a rapid decision. As Habersberger J stated in *Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd*:²⁸⁸

The power to order summary judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried. If it is not possible to say without doubt on the whole of the material that there is no question to be tried, there should be leave to defend.²⁸⁹

²⁸⁴ See, for example, *Merritt Cairns Constructions v Wulguru Heights* (1995) 12 BCL 293 and *Blue Chip Pty Ltd v Concrete Constructions Group Pty Ltd* (1996) 13 BCL 31.

²⁸⁵ Arndt (2008) describes summary judgment as a mechanism aimed squarely at promoting efficiency within the judicial system by minimising both the time and cost of litigation.

²⁸⁶ See *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49, in which the court took a strict approach with respect to the requirements of payment clauses, relying on *Thiess Constructions Pty Ltd v Pavements & Excavations Pty Ltd* (SC No 3709 of 1989; 2 February 1990), and *Algons Engineering PTY Ltd v Abigroup Contractors Pty Ltd* (1997) 14 BCL 215.

²⁸⁷ See *Beckhaus v Brewarrina Council* [2002] NSWSC 960.

²⁸⁸ [2005] VSC 388 at [11].

²⁸⁹ His Honour referred to the following authorities in this respect: *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Incorporated v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 per Barwick CJ; *Fancourt v Mercantile Credits Ltd* (1984) 154 CLR 87 at 99 per Mason, Murphy, Wilson, Deane and Dawson JJ.

The common law test for attaining summary judgment requires that there be ‘no reasonable cause of action’ in relation to any proposed defence raised by the defendant, requiring the defendant’s case to be ‘manifestly groundless’ or ‘clearly untenable’.²⁹⁰

Accordingly, principals have attempted to thwart applications for summary judgments by raising cross-claims, typically in the form of set-offs, against the certified amount, which they argue form the basis of a triable issue.²⁹¹ If a principal can convince the Court that it may possibly have a reasonable basis for such a cross-claim, the Court may refuse judgment until determination of the cross-claim by either court trial or arbitration. As Davenport (2007: 12) notes, contractors’ actions for debt or damages have often been met with cross-claims and have taken ‘months if not years to resolve, by which stage the contract would be at an end. Then a final decision could be made on the entitlements of the parties and there would be no point in a payment on account.’ Therefore, an application for summary judgment by no means guarantees a contractor swift and inexpensive recovery of a certified payment amount.

Cross-claims may be brought by way of counterclaims or set-offs. With respect to contractual progress claims, cross-claims are most often brought by way of set-off. Whilst a set-off is similar to a counterclaim, it differs from a counterclaim in that it is a defence to an originating claim, whilst a counterclaim is an entirely independent, offensive action brought by a defendant against a plaintiff, although in the same proceedings.²⁹² As the Law Reform Commission of New South Wales (2000: [1.5]) explains:

Although the economic result of counterclaim will often be the same as the one which would be achieved by set-off, the result of a hearing involving claim and counterclaim is separate judgments for each party against the other, whereas a single judgment only is issued when set-off is pleaded.

²⁹⁰ See *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. This test has also been consolidated into legislation in several jurisdictions – see, for example, s 13.1 of the *Uniform Civil Procedure Rules 2005* (NSW).

²⁹¹ S 13.2 of the *Uniform Civil Procedure Rules 2005* (NSW) further provides that where a party has made a cross-claim against the party obtaining a summary judgment, the court may stay enforcement of the judgment until determination of the cross-claim.

²⁹² Consequently, set-offs can only be pleaded as a defence to an originating claim within the same action – they can act as a shield, not a sword. See *Stooke v Taylor* (1880) 5 QBD 569 at 575-6 per Cockburn CJ.

Derham (2003: 1) defines set-off on a general level as ‘the setting of money cross-claims against each other to produce a balance.’ The result of set-off is either that the debt is completely discharged, or a sum remains which represents the balance of the debt owed by one of the parties to the other (Law Reform Commission of New South Wales 2000 at [1.4]).

There are four ways by which a legal right to set-off may be attained: at common law, in equity, under insolvency legislation and by contract.

As Nicholson J explained:²⁹³

The right of a common law set-off derives from the English Statutes of Set-Off enacted in 1729 and 1735. These were incorporated into the laws of the various Australian jurisdictions ... A common law set-off applies where there are mutual debts between the parties. It may be “pleaded at bar” and operates as a procedural defence.²⁹⁴

Common law set-off is ‘limited only to mutual liquidated debts, that is, it does not extend to unliquidated damages claims’ (Fasha 2007: 64).²⁹⁵

Traditionally, according to the Law Reform Commission of New South Wales (2000: [1.15]),²⁹⁶ a right to equitable set-off has been interpreted as requiring:

- (i) clear cross-claims for debts or damages, which
- (ii) were so closely related as to subject-matter that the claim sought to be set-off impeached the other in the sense that it made it positively unjust that there should be recovery without deduction.

²⁹³ *Archonstruct Pty Ltd v Karalis & Ors* (No 4) [2012] SADC 5 at [66].

²⁹⁴ This statutory right was repealed in NSW and Queensland by the *Imperial Acts Application Act 1969* (NSW) and *Imperial Acts Application Act 1984* (Qld). However, in NSW, the right to set-off subsequently existed by way of the *Supreme Court Act 1970* (NSW) until it was omitted this Act in 1984. The right now exists in the *Civil Procedure Act 2005* (NSW), s 21.

²⁹⁵ For a consideration of what constitutes a liquidated debt, see: *CGI Information Systems v APRA Consulting Pty Ltd* [2003] NSWSC 728 per Barrett J at [15]; *Hansmar Investments Pty Ltd v Perpetual Trustee Company Ltd* [2007] NSWSC 103 per White J at [56].

²⁹⁶ Citing *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 18; *Lord v Direct Acceptance Corporation Ltd* (1993) 32 NSWLR 362 at 367; Derham (1996: 53-56).

‘Set-off provided for under insolvency legislation is the oldest form of statutory set-off’ (Law Reform Commission of New South Wales 2000: [1.10]). Where a debtor goes into bankruptcy, s 86 of the *Bankruptcy Act 1966* (Cth) provides that mutual debts and credits between the creditor and debtor to be taken into account, and only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.

According to Friedman (2011: 496), ‘There is a contractual set-off when the contract between the parties gives the defendant a more extensive right of set-off than is available to him either at common law, or in equity.’

Most standard forms of construction contract provide for the contract administrator, when calculating payment certificates, to set-off any amounts which are expressly provided for in the contract. For example, the Australian Standards suite of general building contract conditions generally provide that: rectification of defects²⁹⁷ by persons other than the contractor²⁹⁸ and liquidated damages for late completion²⁹⁹ shall be debts from the contractor to the principal; and the amount of such debts in connection with the contract shall be taken into consideration by the superintendent in certifying progress or final payments.³⁰⁰

Most Australian standard forms further provide for the principal to set-off any money due from the contractor otherwise than under the contract.³⁰¹ In this regard, McPherson JA noted in *Wulguru Heights P/L v Merritt Cairns Constructions P/L*³⁰² that:

The deduction which the Principal is authorised by cl.42.10 [of the AS 2124 General Conditions of Contract] to make is a deduction “of any money due from the Contractor to the Principal”. The

²⁹⁷ Whilst damages flowing from the defective works can form the basis of a set-off claim, the reduced value of the contract sum due to the contractor’s failure to complete building works in accordance with the contract cannot. The principal’s right to reduce the amount to be paid for defective contract work is an entirely separate common law right known as abatement. See further Murdoch and Hughes (2000: 308).

²⁹⁸ See, for example, AS 2124–1992, clause 30.3; AS 2545–1993, clause 30.3; and AS 4000, clause 29.3.

²⁹⁹ See, for example, AS 2124–1992, clause 35.6; AS 2545–1993, clause 35.6; and AS 4000, clause 34.7.

³⁰⁰ See, for example: AS 2124–1992, clause 42.1; AS 2545–1993, clause 42.1; and AS 4000, clause 37.2.

³⁰¹ See, for example: AS 2124–1992, clause 42.10; AS 2545–1993, clause 42.10; AS 4000, clause 37.6; and PC-1 1998, clause 12.19.

³⁰² [1995] QCA 273.

expression “money due” is not apt to describe a claim which, as regards liability, has not yet been determined, and, as regards quantum, has not yet been ascertained.

Thus, it would seem likely that set-off for amounts otherwise than under the contract must be more than merely an amount which the principal asserts the contractor is liable to pay.³⁰³

Where a contractual right to set-off is provided, the principal must have satisfied any associated contractual conditions (such as notice provisions) in order to retain its entitlement to set-off.³⁰⁴ Additionally, the courts have found that any contractual right to set-off will be lost if the payment certificate is not issued by the contractually stipulated deadline.³⁰⁵

Due to the potential stalling effect of set-off claims on a contractor’s right to be paid a certified amount, in 1971 the UK courts, recognising the importance of cash flow to contractors, initially sought to limit the principal’s common law and equitable rights to set-off claims against amounts that had already been certified by regarding interim certificates to be tantamount to cash, payment of which was not to be withheld on account of cross-claims unless specifically provided for in the contract.³⁰⁶

This position, however, effectively reversed the presumption that a principal has common law and equitable rights to set-off and was subsequently criticised and effectively overruled just three years later by the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*³⁰⁷ (‘*Gilbert-Ash*’). Referring to *Gilbert-Ash* in *Sopov v Kane Constructions Pty Ltd*,³⁰⁸ Whelan AJA stated:

Lord Diplock observed that one starts with the presumption that each party is entitled to all remedies for breach of contract as would arise by operation of law, including set off. He went on to

³⁰³ See *Wulguru Heights P/L v Merritt Cairns Constructions P/L* [1995] QCA 273 per Davies JA concurring with McPherson JA.

³⁰⁴ See *LU Simon Builders Pty Ltd v HD Fowles* [1992] 2 VR 181 at 194.

³⁰⁵ *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49.

³⁰⁶ *Dawnays Ltd v FG Minter Ltd* [1971] 1 WLR 1205 at 1209.

³⁰⁷ [1974] AC 689.

³⁰⁸ [2007] VSCA 257 at [78], citing *Gilbert-Ash* at 718, 723.

say that this presumption could be rebutted by unequivocal words or clear implication whereby the parties express their agreement that the remedy shall not be available.

The current judicial view in Australia, stemming from the House of Lords' decision in *Gilbert-Ash*, considers each case individually based upon the construction of the terms of the contract in order to determine whether the contract, either expressly or impliedly, clearly excludes the principal's common law and equitable rights to assert set-offs against the amount certified by the contract administrator.³⁰⁹

Based upon this approach, and in order to ensure the contractor's financial ability to continue working, the Australian courts have construed that the terms of several commonly used standard forms of building contract conditions in Australia (including, amongst others, the Joint Contracts Committee (JCC) B 1985 Building Works Contract,³¹⁰ AS 2124–1992,³¹¹ AS 4000–1997,³¹² AS 4300–1995,³¹³ and AS 4303–1995³¹⁴) clearly imply that the common law or equitable rights a principal has to set-off amounts against an interim payment certificate are displaced.³¹⁵ In taking this position, the courts have, amongst other things, been influenced by provisions in the contracts:

- i) for a comprehensive scheme for the certification of payments and the adjustments of liabilities between the contractual parties;³¹⁶
- ii) for reference of any disputes relating to progress payment certificates to an arbitrator, and the fact that any adjustment made to the amount certified by the arbitrator may be taken into account in a later progress certificate or the final certificate;³¹⁷

³⁰⁹ See *J-Corp Pty Ltd v Mladenis* [2009] WASCA 157 at [44]-[47]; *Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Limited* [2007] NSWCA 276 at [217].

³¹⁰ See *LU Simon Builders Pty Ltd v HD Fowles* [1992] 2 VR 181; *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd* [1996] 13 BCL 235 at 29.

³¹¹ See *Re Concrete Constructions Group Pty Ltd* (1997) 1 Qld R 6; *Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd* [1998] VSC 205.

³¹² See *Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd* [2005] VSC 388.

³¹³ See *Daysea Pty Ltd v Watpac Australia Pty Ltd* (2001) QCA 49; *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* (2004) 8 VR 16.

³¹⁴ *Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd* [2000] VSC 402.

³¹⁵ For a comprehensive review of the authorities on this issue, see *Sopov v Kane Constructions Pty Ltd* [2007] VSCA 257 at [78]-[100].

³¹⁶ See *LU Simon Builders Pty Ltd v HD Fowles* [1992] 2 VR 181 at 194.

- iii) that require the principal to pay the contractor ‘an amount not less than the amount shown in the Certificate as due to the Contractor’,³¹⁸ and
- iv) that payment of monies on interim payment certificates is provisional, on account only, and is not to be a final determination of the amount properly due and payable or evidence of the value of work done.³¹⁹

As far as this last point is concerned, Rolfe J stated in *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*.³²⁰

I do not see that there is any unjustness in requiring the parties to abide by the terms of their contract, particularly when in so doing the Court is not precluding the defendant, ultimately, from raising the amounts sought to be set-off as a defence to the final claim and allowing the defendant to rely upon its entitlement to such a set-off under the contract, but in due course. It was submitted on behalf of the defendant that if it had a defence that defence can be availed of immediately. I think the answer to that submission is that on a proper construction of the contract, and in the circumstances which have occurred, it does not have a present right to raise that defence. The defence will be available at a later point, the right to bring it being deferred by the terms of the contract.

Although the courts have limited the general legal right to set-off under several standard forms of construction contract, this right remains in certain other standard forms and bespoke contracts, where the right to set-off either has not been clearly excluded or is even expressly stated to exist.

For example, in the South Australian case of *Construction Services Civil Pty Ltd v J & N Allen Enterprises Pty Ltd*,³²¹ an application for summary judgment in relation to a certified progress payment was dismissed because the relevant contract did not contain a provision that payment of the progress certificates was to be ‘on account only’. Instead the contract provided that, unless a progress certificate was disputed by notice in writing within 10

³¹⁷ *Ibid.*

³¹⁸ *Re Concrete Constructions Group Pty Ltd* (1997) 1 Qld R 6.

³¹⁹ See *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (1997) 14 BCL 215; *Re Concrete Constructions Group Pty Ltd* (1997) 1 Qld R 6.

³²⁰ (1997) 14 BCL 215 at 230.

³²¹ (1985) 1 BCL 363.

days of issue, it was conclusive evidence of materials, labour and other items provided by the builder during the period under review.

The Property Council Project Contract PC-1 1998 standard form of contract conditions clearly preserves an owner's right to set-off at general law by expressly stating that the owner's obligation to pay the contractor is subject to the owner's right to set-off from amounts due to the contractor any debt due from the contractor or claims against the contractor for damages or otherwise.³²²

Of particular relevance to the security of payment problem is that, as discussed in Chapter 4.3.3, subcontractors in the lower ranks of the contracting chain are commonly engaged under the employing contractor's own contractual terms. These terms are unlikely to include provisions that exclude a principal's right to set-off. Consequently, smaller contractors are unlikely to be able to enforce a summary judgment for a certified amount in the face of a claim for set-off by its employing contractor, if indeed the contractual terms allow for certified progress payments at all.

4.3.6 The Inefficacy of Traditional Dispute Resolution Procedures

Notwithstanding the avenues, discussed above, that are available at common law to challenge undervalued payment certificates and enforce certified amounts, the construction industry has become blighted by payment defaults. Thus, the remedies available at common law have proved ineffective as a means of addressing the security of payment problem in the building and construction industry.

One of the primary reasons for the impotence of the common law is the lengthy and costly nature of litigation and arbitration, as discussed in Chapters 2.2.1 and 3.4.2, which renders actions impracticable for most, particularly smaller, contractors. As the Royal Commission into the Australian Building and Construction Industry (2002: 71) observes:

Frequently they [subcontractors] 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.

³²² See PC-1 clause 12.19.

Added to this is the fear for smaller contractors that initiating legal action against a larger contractor may jeopardise their chances of obtaining future work.

Consequently, when there is a dispute regarding payment for construction works carried out, the party holding the money (ie, the principal) holds a significant advantage, as the onus is on the other party (ie, the contractor or supplier) to invest significant resources in mounting a legal action in order to enforce payment of monies owed.

In practice, most smaller contractors, when faced with a payment dispute, are desperate for cash flow for commercial survival. Unable to afford arbitration or litigation, they reluctantly accept whatever payment is made, or even abandon their right to payment (Brand and Uher 2008: 3), and move onto the next project in order to earn vital cash flow to stay afloat (see *Example 2* in Table 4.2).

4.4 The Consequences of the Security of Payment Problem

The direct consequence of the security of payment problem to contractors is the stemming of cash flow, which is very often vital to both their ability to pay their own subcontractors and to their own commercial survival. Indeed the vitality of cash flow in the construction industry has frequently been referred to by the courts, none more famously so than when Lord Denning commented in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd*³²³ that, ‘there must be cash flow in the building trade. It is the very lifeblood of the enterprise ... He [the subcontractor] cannot go on unless he is paid for what he does as he does it.’³²⁴

By choking cash flow to contractors, the security of payment problem significantly contributes towards the high insolvency rate in the construction industry (see Chapter 4.3.2). The consequential effect of contractor insolvencies on the construction industry as a whole is to reduce the pool of specialist trade contractors, resulting in high potential for

³²³ (1973) 71 LGR 162 per Lord Denning at 167, cited with approval in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 214 (HL) per Lord Diplock.

³²⁴ Lord Denning’s words were echoed by Ian MacDonald (2002: 7815) in his second reading speech for the *Building and Construction Industry Security of Payment Amendment Bill 2002* (NSW).

the occurrence of skills shortages, delays in construction and increases in tender prices (WA Security of Payment Review 2001: 9). The disappearance of specialist trade contractors is detrimental to head contractors, who would subsequently find it difficult to source competitive prices from well resourced subcontractors, and also to building owners who would have to pay more and wait longer for their buildings. This is a particularly harsh outcome for well-managed and ethical building owners and head contractors, whose normal practice is to pay their contractors in an equitable and timely manner.

4.5 Summary

Several Government commissioned reports in Australia have established that the security of payment problem is endemic in the construction industry. The security of payment problem has been fuelled by the industry's risky financial environment coupled with the contracting chains that exist on most construction projects. This has resulted in the construction industry experiencing high rates of business insolvency which, in turn, adds to the security of payment problem. The tendency for construction firms to be undercapitalised further compounds the security of payment problems caused by insolvency.

By virtue of their position in the lower tiers of the industry's contracting chains, smaller contractors are at relatively more risk of suffering cash flow problems caused by the security of payment problem. Furthermore, due to their small asset base and scarce resources, smaller contractors are likely to be the firms in the contracting chain which are least resilient to the stemming of cash flow into their business.

Larger contractors within the construction industry are typically engaged under industry standard forms of contract, which provide mechanisms for regular progress payments to be independently certified by a contract administrator as the works proceed. Although progress payments have been made on this basis in the industry for several decades, their certification by a contract administrator who is on the principal's payroll has led to perceptions amongst contractors that payment valuations may be biased in favour of the principal. Whilst there are avenues at common law for contractors to challenge the valuation of payment certificates, they have proved ineffective, primarily due to the prohibitively costly and lengthy nature of court and arbitration proceedings.

Industry standard forms are not typically used to engage smaller contractors in the industry. Instead, due to their lack of bargaining power, smaller contractors are often engaged under their principal's own terms which invariably favour the principal. As such, smaller contractors may well not be entitled to regular and independently certified progress payments and may be subject to unfair payment provisions, such as conditional payment clauses. Furthermore, as opposed to the situation under most industry standard forms, the principal is likely to retain their rights at general law to set-off amounts owed to it by the contractor against any certified payment amounts due to the contractor. This means that a principal may thwart any attempt by its contractor to secure summary judgment with respect to payment of a certified amount, if it can show a reasonable cause of action in relation to a set-off.

The lack of effective, affordable and timely legal remedies for breaches of contractual progress payment provisions has permitted unscrupulous, or financially beleaguered, principals to get away with unethical payment practices in the construction industry. This has engendered the somewhat perverse circumstance of smaller contractors, who are least able to afford it, providing cheap credit to the larger contractors above them in the hierarchical contracting chain. Apart from the inequity of this circumstance, the net effect is a higher rate of construction insolvencies than there should be, which reduces the supply of specialist trade contractors to the detriment of the industry and its clients.

Chapter 5

Responses to the Security of Payment Problem

5.1 Options to Improve Security of Payment

Over the past 16 years, there have been several government, industry, and professional reports and discussion papers which have considered the options, and made recommendations, for tackling the security of payment problem.³²⁵ In addition to the introduction of security of payment legislation, which is considered in more detail in Chapter 6, the options considered have included:

- liens and charges legislation;
- payment of interim progress payments into trust funds;
- insuring against bad debts caused by insolvency of clients;
- enhancing building contractors' licensing conditions;
- implementing codes of practice that specify clear guidelines with respect to payments to subcontractors;
- implying proof of payment clauses into construction contracts by statute; and
- other measures, such as payment bonding, direct payments, stop notices, holdbacks and covenanting.

This chapter will consider the operation and potential effectiveness of each of these options with respect to improving security of payment for contractors within the construction industry.

5.2 Liens and Charges Legislation

There are three Australian Acts currently in operation that, in certain circumstances, entitle subcontractors in the construction industry to liens and/or charges over particular assets of

³²⁵ See the reports and papers listed in Table 4.1. Additionally, see the following: Latham (1994); Law Reform Commission of Western Australia (1995).

third party employers, principals or building owners for the monies owed by a defaulting contractor. These Acts are the:

- *Subcontractors' Charges Act 1974* (Qld);
- *Contractors Debts Act 1997* (NSW); and
- *Worker's Liens Act 1893* (SA).

Whilst all of the Acts are concerned with protecting the rights of subcontractors to be paid, their ability to improve the security of payment problem has significant limitations. Not least of these limitations is that all these Acts require litigation in order to enforce the statutory liens or charges they create.

The operation of each Act, and their limitations with respect to improving the security of payment problem, are discussed in detail below.

5.2.1 *Subcontractors' Charges Act 1974* (Qld)

The *Subcontractors' Charges Act 1974* (Qld) enables a subcontractor to create a statutory charge, in the nature of a security interest, over the monies (including any retention and security monies) payable to the building contractor from the contractor's employer or superior contractor. This enables a subcontractor to gain some protection from a defaulting and/or insolvent contractor by facilitating 'a process whereby monies are frozen pending final contractual resolution of a payment dispute through the courts' (Queensland Building and Construction Industry Payments Agency 2006). As the Honourable William Knox stated when introducing the legislation:³²⁶

The objects of the Act are to secure payment of money due to subcontractors by placing the onus on the principal to retain certain money payable to the contractor until the court in which the claim is heard directs to whom and in what manner the same is to be paid.

Thus, the Act allows a subcontractor to effectively transform its status, with respect to the amount it claims is due from the building contractor, from unsecured to secured creditor.

³²⁶ As seen in Queensland Building Services Authority (2001: 17).

The first step in creating a statutory charge is for the subcontractor to serve a ‘notice of claim of charge’ on both building contractor and the building contractor’s employer, or superior contractor, who owes the money to the building contractor.³²⁷ The notice of claim of charge must specify the amount and particulars of the claim in relation to the relevant work certified,³²⁸ as prescribed by a qualified person.³²⁹ The notice must be supported by a statutory declaration of the subcontractor.³³⁰

Such a notice can be served at any time during the subcontract period, even after the external administration of the contractor has commenced.³³¹ A notice of claim of charge may be given although the work is not completed or the time for payment of the money in respect of which the charge is claimed has not arrived. However, the notice must be served within 3 months after the completion of the work which forms the basis of the claimed amount.³³²

Within 14 days after the notice of the claim of charge is given to the building contractor to whom the money is payable, the building contractor must give a notice to its employer or superior contractor by whom the money is payable, and also to the subcontractor. The notice (contractor’s notice), which must be in the approved form, must specify that the building contractor:

- (a) accepts liability to pay the amount claimed; or
- (b) disputes the claim; or
- (c) accepts liability to pay the amount (the stated amount) stated in the contractor’s notice, but otherwise disputes the claim.³³³

³²⁷ *Subcontractors’ Charges Act 1974* (Qld), s 10(1).

³²⁸ For definition of the work covered by the *Subcontractors’ Charges Act 1974* (Qld), see ss 3 & 3AA of the Act.

³²⁹ A qualified person is defined in s 10A(1) of the Act, and includes a registered architect and registered engineer.

³³⁰ *Subcontractors’ Charges Act 1974* (Qld), s 10(1B).

³³¹ *Re Stockport (N.Q.) Pty Ltd* (2003) 127 FCR 291 at 305-306.

³³² *Subcontractors’ Charges Act 1974* (Qld), s 10(2).

³³³ *Subcontractors’ Charges Act 1974* (Qld), s 11(3).

Where the building contractor's notice accepts liability for all or any part of the amount claimed by the subcontractor, the employer or superior contractor must pay the amount stated in the building contractor's notice to the subcontractor.³³⁴ If the building contractor disputes the subcontractor's claim in whole or in part, the subcontractor must take steps to enforce the outstanding amount of the charge by commencing proceedings in a court of competent civil jurisdiction.³³⁵ Such proceedings must be commenced within one month³³⁶ after the subcontractor's notice of claim of charge has been given.³³⁷ Failure to meet this timeframe³³⁸ will lead to the charge being extinguished.³³⁹

There are several potential complications, or pitfalls, however, which might thwart a subcontractor's attempt to successfully create and/or enforce a charge.³⁴⁰

Firstly, charges may be overturned by the court if the subcontractor's notice of claim of charge is not properly drafted, containing the relevant details and given within the prescribed time frame.

Secondly, the subcontractor can only lodge a charge on money owed to the building contractor by its employer. As such, in order for a court to grant leave to proceed with an action to enforce a charge, it is likely there needs to be monies owed by the employer to the contractor to which the charge can attach (HopgoodGanim Lawyers 2010: 3-4). As the Queensland Building Services Authority (QBSA) (2001: 21) states:

³³⁴ *Subcontractors' Charges Act 1974* (Qld), ss 11(4) & 11(4A).

³³⁵ *Subcontractors' Charges Act 1974* (Qld), s 12.

³³⁶ Or, in the case of retention monies only, within 4 months after such retention money or the balance thereof is payable and no later: *Subcontractors' Charges Act 1974* (Qld), s 15(1)(a).

³³⁷ *Subcontractors' Charges Act 1974* (Qld), s 15(1)(b).

³³⁸ In *State of Queensland v Walter Construction Group* [2005] QS 241, it was held that the one month limitation period for commencement of proceedings will be suspended where the contractor is in voluntary administration as s 15 of the *Subcontractors' Charges Act 1974* (Qld) should be read together with s451D of the *Corporations Act 2001 (Cth)*.

³³⁹ *Subcontractors' Charges Act 1974* (Qld), s 15(3).

³⁴⁰ In addition to these pitfalls, the Queensland Building Services Authority (2001: 19-20) lists several tactics that may be used by 'rogue' commercial building contractors in order to delay or avoid payment of the subcontractor's claim subject to the notice of claim of charge.

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The Act ... delivers no practical benefits to subcontractors working on a commercial project if there are no monies owing by the principal to the building contractor under the construction contract.

Thirdly, if more than one subcontractor has served a charge notice on the building contractor, the money owed by an employer to the building contractor will often be insufficient to meet the claims of all the subcontractors. Where the building contractor has become insolvent, it is indeed quite likely that several subcontractors will have served charge notices. In such circumstances, any insufficiency in the money owed by the employer must be borne by the subcontractors who have a charge in proportion to the amounts of their claims.³⁴¹

Fourthly, an employer may defend the subcontractor's action to enforce the charge in court by reference to any offsetting claims the employer may have against the building contractor. Such defences include, for example, defective works and the insolvency of the building contractor amounting to a breach of contract which has caused the employer to suffer loss (HopgoodGanim Lawyers 2010: 4).

Fifthly, a subcontractor who has lodged, or is planning to lodge, a valid charge needs to be wary of lodging a proof of debt or resolving to accept any deed of company arrangement during the insolvency administration of the contractor. A subcontractor may forfeit its right to assert a charge if it lodges a proof of debt under a deed of company arrangement.³⁴² Further, a subcontractor who votes in favour of such a deed is usually bound by its terms,³⁴³ which may have the effect of invalidating any charge they have, or could have lodged, and relegate the subcontractor to the position of an unsecured creditor (Shepherd, Guthrie and Pyman 2003: 52).³⁴⁴

The numerous pitfalls associated with the use of the *Subcontractors' Charges Act 1974* (Qld) have led to much criticism. For example, the QBSA (2001: 18) states:

³⁴¹ *Subcontractors' Charges Act 1974* (Qld), s 8(1).

³⁴² *Seventeenth Canute Pty Ltd v Bradley Air Conditioning Pty Ltd (in liq)* [1987] 1 Qd R 11.

³⁴³ *Re Stockport (N.Q.) Pty Ltd* (2003) 127 FCR 291 at 297.

³⁴⁴ For example, see *Seventeenth Canute Pty Ltd v Bradley Air Conditioning Pty Ltd (in liq)* [1987] 1 Qd R 11.

in practical terms the actual application of the [Subcontractors' Charges] Act has proved, on numerous occasions, to be an extremely frustrating experience for the majority of parties involved. Indeed it seems on many occasions that the only winners in these matters have been the lawyers representing their clients. Matters are not normally quickly resolved and the legal costs associated in pursuing payments from building contractors has [sic] forced a significant number of subcontractors not to proceed with actions initiated.

Further, the draftsmanship of the Act has been much criticised for being uncertain and difficult to interpret.³⁴⁵ The QBSA (2001: 21) remarks that the 'Act has become so difficult to interpret that its value must be questioned.'

5.2.2 Contractors Debts Act 1997 (NSW)

The *Contractors Debts Act 1997* (NSW) is similar to the *Subcontractors' Charges Act 1974* (Qld) in that it allows for a subcontractor to recover payment directly from the building contractor's principal³⁴⁶ for work or materials that the principal engaged the defaulting contractor to carry out or supply under a contract.³⁴⁷ The mechanism provided for achieving this, however, differs between the two Acts. Whereas the *Subcontractors' Charges Act 1974* (Qld) entitles a subcontractor to provide a notice of claim of charge to the contractor's employer in order to secure monies claimed from the building contractor, the *Contractors Debts Act 1997* (NSW) allows:

- (i) assignment to the subcontractor of the principal's contractual obligation to pay the money owed³⁴⁸ to the defaulting contractor;³⁴⁹ and
- (ii) a subcontractor to seek from the court an attachment order against the contractor's principal for the amount it claims is owed from the building contractor.³⁵⁰

³⁴⁵ See *Ex parte Pavex Constructions & Ors* [1979] Qd R 318 per Dunn J at 334; *Rees v Mt Isa City Council* [1979] Qd R 553 per Connolly J at 559; Australian Construction Law Newsletter Editors (1997).

³⁴⁶ The *Contractors Debts Act 1997* (NSW) uses the term 'principal' in lieu of 'employer' as found in the *Subcontractors' Charges Act 1974* (Qld).

³⁴⁷ *Contractors Debts Act 1997* (NSW), s 5.

³⁴⁸ The courts has held that money owed for the purposes of the *Contractors Debts Act 1997* (NSW) does not include uncalled security, such as a performance bond issued by a bank, provided by a contractor to a principal: see *George Feros Memorial Hostel Committee Incorp v Hammat Constructions Pty Ltd* (2001) 17 BCL 66.

³⁴⁹ *Contractors Debts Act 1997* (NSW), s 8(1).

In order to obtain payment of the defaulting contractor's debt from the principal, a subcontractor must serve on the principal a notice of claim together with a copy of a debt certificate.³⁵¹ A subcontractor may apply to the court for a debt certificate when it has obtained judgment³⁵² in any proceedings relating to the recovery of the money it is owed from the contractor for work carried out or materials supplied.³⁵³

If a debt certificate is issued in respect of a debt owed to a subcontractor by a defaulting contractor, the defaulting contractor must, on the demand of the subcontractor, supply to the subcontractor the names of any person from whom the subcontractor may be able to recover the debt.³⁵⁴

Section 16 of the Act further provides that if a principal fails to pay a debt assigned to a subcontractor, the subcontractor can obtain payment of the debt out of money that is payable to the principal by some other person.³⁵⁵

Once a subcontractor has commenced proceedings³⁵⁶ against the defaulting contractor, the subcontractor may apply to the court to make an attachment order with respect to the money owed.³⁵⁷ An attachment order may be granted by the court only if:

- (i) the building contractor owes the subcontractor money for work carried out or materials supplied by the subcontractor;³⁵⁸ and
- (ii) the work or materials are, or are part of or incidental to, work or materials for which

³⁵⁰ *Contractors Debts Act 1997* (NSW), s 14.

³⁵¹ *Contractors Debts Act 1997* (NSW), s 6(2).

³⁵² Including a default judgement: *Contractors Debts Act 1997* (NSW), s 7(5).

³⁵³ *Contractors Debts Act 1997* (NSW), s 7(1).

³⁵⁴ *Contractors Debts Act 1997* (NSW), s 15.

³⁵⁵ Examples of the circumstances where s 16 may apply are given as a note to s 16 of the *Contractors Debts Act 1997* (NSW), and also in Davenport (2010a:224).

³⁵⁶ It has been held that the reference of a dispute to arbitration under a contract amounts to commencement of proceedings for the purposes of the *Contractors Debts Act 1997* (NSW): see *De Martin and Gasparini Pty Ltd v Ex Parte Energy Australia Pty Ltd & Austin Australia Pty Ltd* [2000] NSWSC 55 at [27].

³⁵⁷ *Contractors Debts Act 1997* (NSW), s 14(2)(a).

³⁵⁸ *Contractors Debts Act 1997* (NSW), s 14(3)(a).

the building contractor is to be paid under a contract with the employer against whom the order is sought.³⁵⁹

The effect of an attachment order is to freeze the money that is payable or becomes payable to the subcontractor in the hands of the employer,³⁶⁰ thus preventing payment of that money by the employer to the building contractor until judgment is given in the relevant proceedings initiated by the subcontractor against the building contractor, or until the court otherwise orders.³⁶¹

The support which the Act provides to subcontractors' cash flow, however, is 'handicapped by the time and cost involved with court action' (Mort and Riddell 2010: 1). As Dorter and Sharkey (2007: 2661) state, 'The right of recovery [under the Act] is subject to any defence that the principal would have had against recovery by the defaulting contractor.'

Davenport (2010a: 223) considers that, with the exception of section 16 (as discussed above) which is unlikely to be used in practice, the assignment process under the Act 'is essentially the same as the garnishee process that exists for enforcement of any judgment and does not materially increase the remedies available to an unpaid subcontractor.'

5.2.3 *Worker's Liens Act 1893 (SA)*

The *Worker's Liens Act 1893 (SA)* provides a subcontractor with two potential paths by which to recover debts for work or materials which have been done, supplied, or manufactured under the contract with a defaulting contractor.

Firstly, similar to the *Subcontractors' Charges Act 1974 (Qld)*, the *Worker's Liens Act 1893 (SA)* provides that a subcontractor shall have a charge over any money payable by the 'owner' to the defaulting contractor in respect of work done or materials furnished or

³⁵⁹ *Contractors Debts Act 1997 (NSW)*, s 14(3)(b).

³⁶⁰ Dorter and Sharkey (2007: 2662) state that the attachment order acts as an interlocutory injunction, citing *Re Dossi; Ex parte Official Assignee; Langdon (Respondent)* (1905) 5 SR (NSW) 204; *Shircore Heaysman Pty Ltd v Sign Equipment Pty Ltd* [1966] 2 NSW 467.

³⁶¹ *Contractors Debts Act 1997 (NSW)*, s 14(4).

manufactured by the subcontractor.³⁶² For a charge to avail as to any moneys due from the owner to the defaulting contractor, the subcontractor must give notice of such charge to the owner.³⁶³ A subcontractor is only entitled to bring an action to enforce the charge if, in accordance with section 10(2)(a) of the Act, the amount payable remains unpaid for 7 days after the subcontractor has demanded from the defaulting contractor the amount payable by notice in writing.³⁶⁴ Unless an action is brought to enforce the charge by the subcontractor within twenty-eight days after payment has become due within the meaning of section 10(2), the charge shall lapse.³⁶⁵

Secondly, a sub-contractor is granted a lien limited to the extent of the unpaid portion of the contract price³⁶⁶ on the estate or interest in land of any owner provided that the work is done, or materials used, with the assent of the owner.³⁶⁷ A subcontractor who is owed money by the contractor under the contract may register such a lien³⁶⁸ within 28 days of the money becoming due.³⁶⁹ The lien will cease unless an action is brought against the owner for enforcement of the lien within fourteen days from the date of registration.³⁷⁰

A registered lien is deemed to be a caveat forbidding the registration of any dealing with the estate or interest sought to be affected by the lien, unless the dealing is expressed to be subject to the claim of the subcontractor.³⁷¹ Grace (2008) notes that:

A lien is particularly powerful where a building is constructed for sale on completion, such as a speculative development by an owner. In such cases, the registration of a lien often leads to the early resolution of a dispute.

³⁶² *Worker's Liens Act 1893* (SA), s 7(2).

³⁶³ *Worker's Liens Act 1893* (SA), s 7(5).

³⁶⁴ See *Colmup Pty Ltd v Mecair Engineering Pty Ltd; Sitzler Bros Pty Ltd and Sitzler Bros (Darwin) Pty Ltd No. 571 of 1988 Companies - Workman's Lien* (1988) 53 NTR 9 per Kearney J at [27].

³⁶⁵ *Worker's Liens Act 1893* (SA), s 7(3).

³⁶⁶ *Worker's Liens Act 1893* (SA), s 6.

³⁶⁷ *Worker's Liens Act 1893* (SA), s 5.

³⁶⁸ A subcontractor may register a lien by lodging in the General Registry Office a notice in the prescribed form accompanied by the prescribed fee: see s 10(3) of the *Worker's Liens Act 1893* (SA).

³⁶⁹ *Worker's Liens Act 1893* (SA), s 10(2)(a).

³⁷⁰ *Worker's Liens Act 1893* (SA), s 15.

³⁷¹ *Worker's Liens Act 1893* (SA), s 12.

An owner may relieve themselves of liability with respect to either a lien or a charge by payment into court of the amount claimed.³⁷² An owner who alleges that he or she is prejudicially affected by a lien or charge under the Act may at any time apply to the court to have the lien or charge cancelled.³⁷³ In the event that judgment is obtained in proceedings by a subcontractor against the defaulting contractor for the unpaid amount and the owner fails to pay the money owed, the court may order the enforcement of the lien by issuing a writ or warrant for the sale of the estate or interest in land which is the subject of the lien.³⁷⁴

Despite the paths it offers for debt recovery, the Worker's Liens legislation has come under much criticism for being ineffective in practice, particularly for employees and smaller subcontractors whom the legislation was originally intended to protect. The practical problems with the legislation were discussed in detail by the Northern Territory Department of Justice (2002: 30) in their discussion paper reviewing the operation, and recommending the repeal, of the old *Workmen's Liens Act* (NT), which was in all material respects the same as the *Worker's Liens Act 1893* (SA). Following this recommendation, the NT Parliament repealed the *Workmen's Liens Act* upon the commencement³⁷⁵ of the *Construction Contracts (Security of Payments) Act* (NT).³⁷⁶ In his second reading speech for the *Construction Contracts (Security of Payments) Bill* (NT), the Minister (Toyne 2004) summarises many of the problems associated with the operation of the *Workmen's Liens* legislation (NT) as follows:

Until now, their [subcontractors'] only recourse was to register a lien against the title to land upon which the construction works were carried out, or to which materials were supplied in respect of those works, and then to litigate. The time limits and technical requirements of the *Workmen's Liens Act* often meant that contractors lost their right to have a lien registered against the title. It also meant that titles would be encumbered by liens when disputes proceeded slowly through the courts. Sometimes the owner of the land would only be a spectator in a dispute between a contractor and a sub-contractor. Whilst the registration of a lien may have given some security of payment, it did little to speed up the payment process.

³⁷² *Worker's Liens Act 1893* (SA), s 26.

³⁷³ *Worker's Liens Act 1893* (SA), s 32.

³⁷⁴ *Worker's Liens Act 1893* (SA), s 25(1).

³⁷⁵ On 1 August 2006.

³⁷⁶ See s 66 of the *Construction Contracts (Security of Payments) Act* (NT).

Further, the Law Reform Commission of Western Australia (1974: [35]) notes that ‘the registration of a lien against land may be detrimental to an owner who is in no way at fault’, and the Northern Territory Department of Justice (2002: 30)³⁷⁷ observes:

- “the Act no longer serves the purpose for which it was intended”, but that its operation was actually “imped[ing] the rational resolution of an insolvent builder’s affairs” in “stopping the supply of money to building projects, the consequent reduction of payment to unsecured creditors and the disruption to the projects affected”.
- the irony that if the lienor ultimately failed to recover the amount claimed (where, for example, the owner had already paid the builder or the money was not due), the lien “has achieved nothing except to worsen each party’s position”.
- only a small number of liens are legally successful, perhaps as low as 5%.

The Worker’s Liens legislation has also been heavily criticised for being antiquated,³⁷⁸ obscure³⁷⁹ and using enigmatic language,³⁸⁰ which Angel J³⁸¹ considers as having led to ‘conflicting judicial opinions as to the meaning of its sometimes puzzling language.’³⁸²

With respect to charges, the Worker’s Liens legislation generally encounters the same pitfalls as discussed in Chapter 5.2.1 with respect to charges under the *Subcontractors’ Charges Act 1974* (Qld).

³⁷⁷ Citing the findings from the Select Committee of the South Australian House of Assembly’s (1990) review of the *Worker’s Liens Act 1893* (SA), which recommended that the legislation should be repealed.

³⁷⁸ *Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors* (Unreported, NT Supreme Court, Bailey J, 4 February 1999) at 5, as cited in Northern Territory Department of Justice (2002: 27).

³⁷⁹ *Ibid.*

³⁸⁰ *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (Administrator Appointed)* (Unreported, NT Supreme Court, Angel J, 27 November 1998), as cited in Northern Territory Department of Justice (2002: 27).

³⁸¹ *Leichardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR 1 at 1, as cited in Northern Territory Department of Justice (2002: 27).

³⁸² For discussion of all the significant decisions on the Worker’s Liens legislation from South Australia and the Northern Territory, see Fenwick Elliott (2010a).

5.3 Trust Funds

The use of mandatory statutory trust funds to provide financial protection for head contractors and subcontractors in the construction industry, as has been legislated in a number of states in the United States³⁸³ and provinces in Canada,³⁸⁴ has been the subject of much consideration in Australia.

Although there are many variables with respect to the structure of such trust funds, the basic premise is that the money received by the head contractor ('the trustee') from the owner, or the subcontractor from the head contractor, on account of their contract price is deemed to be held in trust for the benefit of their subcontractors, workers and suppliers ('the beneficiaries') (Law Reform Commission of Western Australia 1995: 16; Cameron 2000: 16-31). Money held in a statutory trust transforms what would otherwise be a debtor-creditor relationship into a fiduciary one where failure of a trustee to pay a debt would potentially constitute a breach of trust (Law Reform Commission of Western Australia 1995: 16). The money is not part of the trustee contractor's assets in liquidation (Cameron 2000: 16-31) and, therefore, is preserved for the beneficiaries of the trust (Law Reform Commission of Western Australia 1995: 16).

In order to ensure maximum effectiveness, a trust scheme should include a statutory requirement for moneys to be held in a separate trust account to prevent the trust funds becoming mixed with the trustee's other money and becoming unidentifiable (Law Reform Commission of Western Australia 1995: 16). A trustee contractor may not appropriate trust moneys for its own use unless permitted by the statutory provisions, and is only permitted to transfer to its own account the balance of money remaining in the trust fund once all its subcontractors and suppliers have been paid all monies due (Law Reform Commission of Western Australia 1995: 16 & 23).

³⁸³ At least 13 states have adopted builders' trust fund Acts, including California, Colorado, Delaware, Maryland, Michigan, New York, Ohio, Oklahoma, Tennessee, Texas, Utah, Washington, and Wisconsin.

³⁸⁴ See, for example, the trust provisions of the *Builders Lien Act* in Alberta (s 22), British Columbia (s 10), Manitoba (ss 4-9), Nova Scotia (s 44), and Saskatchewan (Part II). Also see, the trust provisions of the *Construction Lien Act* in Ontario (Part II).

Responses to the Security of Payment Problem

The Law Reform Commission of Western Australia (1995: 16-33; 1998: 49-77) comprehensively considered the potential use, structure and ramifications of statutory trust funds in the construction industry. The Commission (1995: 18) found that statutory trusts have 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. Because the moneys are held in trust, they cannot be seized or frozen by a receiver or liquidator of the trustee.
3. A wider range of remedies is available for a breach or possible breach of trust.
4. It may result in a speedier resolution of disputes between, for example, a head contractor and a subcontractor, because generally the head contractor could not withdraw money from the trust fund until all the claims of the fund's beneficiaries had been met.
5. For the same reason, it may result in speedier payment of subcontractors.

However, the Commission (1995: 19) also found that statutory trusts have the following disadvantages:

1. It may not be simple to administer, particularly if every party (except those with no obligation to pay a subcontractor) in the contracting chain is required to act as a trustee of funds.
2. There may be additional costs associated with administering the trust moneys. For example, there might be a requirement that trust accounts be audited annually.
3. Many contractors may not have the bookkeeping ability to comply with the strict accounting requirements of trust accounts.
4. It is effective only to the extent that there is trust property 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. In the situation of underbidding or of set-off, it is conceivable that a trust beneficiary will not be paid in full even though there has been no breach of trust anywhere in the chain. As long as a trustee pays all trust money he receives, he discharges his obligation even though his beneficiary is not paid in full.”³⁸⁵

³⁸⁵ Citing Ettinger (1989: 393).

Harmonisation of Security of Payment Legislation

5. It affects the cash flow of a head contractor who might otherwise divert payments elsewhere while still being able to meet payments to subcontractors as they fall due.
6. Those higher up the contractual chain may attempt to evade a trust scheme by adopting a residence or domicile or obtaining finance outside the State.
7. However, the State Parliament can enact laws having extra-territorial effect, that is, laws which affect persons, conduct or things outside the State, so long as the law has a sufficient connection with the State.

Although the Law Reform Commission of Western Australia (1998: 51) subsequently recommended that a statutory trust scheme be established in the building and construction industry, most government and industry reports have recommended against the adoption of trust funds in the Australian construction industry,³⁸⁶ primarily due to the firmly held belief across many different sectors of the industry that formal trusts across the industry are not cost effective (Cole 2003: Vol 8, 249). Whilst noting that there is not a great deal of evidence to support this widespread belief,³⁸⁷ Cole (2003: Vol 8, 249) acknowledged its existence by referring to the submissions of several industry participants,³⁸⁸ who expressed concerns that trusts would be too difficult to implement and unworkable, and the findings of the QBSA (2001: 6), which state:

With regard to Queensland and NSW, the Governments concerned rejected the implementation of such a scheme for a number of reasons, the primary ones being:

- Serious legal shortcomings – need to resolve involvement of third parties, effect on funds in case of dispute, requirement for complex drafting making legislation unworkable in practice;
- A likely increase in the cost of building projects because of shortened payment cycles, thereby making finance more expensive;
- The failure to guarantee that subcontractors would get paid;

³⁸⁶ See, for example, Price Waterhouse (1996: 26); QBSA (2001: 6); Cole (2003: Vol 8, 249).

³⁸⁷ As such, Cole (2003: Vol 8, 250) stated that by not recommending the adoption of a trust model, this did not mean it was not recommending against the use of deemed trusts.

³⁸⁸ Including the Australian Industry Group, the Australian Constructors Association, the Housing Industry Association and Hansen Yunken Pty Ltd.

- The lack of support across the industry eg. property council, financial sector and builders strongly opposed to the introduction of such schemes;
- The administrative cost burden – greater monitoring of bank accounts, additional administrative procedures in agencies and contractors for identification of funds, increased training for builders and subcontractors.

5.4 Insolvency Insurance

As the Independent Pricing and Regulatory Tribunal of NSW (2000: 6-8) explains, ‘Compulsory security of payments insurance would require all industry participants to take out insurance for the benefit of those to whom they contract work.’ This would require head contractors taking out insurance for their subcontractors, and subcontractors taking out insurance for the benefit any subcontractors below them in the contracting chain. Such a scheme is equitable in that it provides a universal insurance scheme for the benefit of all building industry contractors.

The primary benefit of compulsory insurance would be to enable those subcontractors with unsecured debts owed by insolvent head contractors to recover their losses by claiming against an insurance policy (WA Security of Payment Taskforce 2001: 14). As the Independent Pricing and Regulatory Tribunal of NSW (2000: 6) noted, compulsory insolvency insurance would have the effect of spreading out the losses which are suffered by some subcontractors across all industry participants. Other benefits identified by the Tribunal (2000: 6-8) included the possibilities of:

- a reduction in the cascading nature of industry insolvencies (as discussed in Chapter 4.3.2);
- an improvement in financial and credit management by building industry participants in order to meet the requirements to obtain the compulsory insurance; and
- a realisation in administrative savings by Government in relation to building registration due to insurers, in lieu of Government, ensuring minimum prequalification standards are met by building contractors.

Notwithstanding such benefits, there exists a widespread consensus in the construction industry against imposing compulsory insolvency insurance on building contractors³⁸⁹ for the following reasons:

- the construction industry would have to bear the additional cost beyond existing losses, estimated to be in the order of 2-3 per cent, of having to compensate the insurance industry for insuring risk of insolvency (Independent Pricing and Regulatory Tribunal of NSW (2000: 7-8);
- the resultant increase in cost is likely to push some industry participants from the industry (Independent Pricing and Regulatory Tribunal of NSW 2000: 9);
- some sections of the industry, such as smaller subcontractors and fast-growing building companies, may be unable to afford or qualify for insurance (Independent Pricing and Regulatory Tribunal of NSW 2000: 7-8);
- ‘[a]ctuarially fair premiums may also exacerbate a downturn in the industry. As conditions deteriorate and the risk of smaller players going insolvent increases, insurance companies will impose higher premiums’ (Independent Pricing and Regulatory Tribunal of NSW 2000: 7).
- ‘it is not appropriate to compel subcontractors who are capable of protecting their own interests to participate in a scheme’ (Law Reform Commission of Western Australia 1998: 97);
- ‘the capacity for fraud ... is monumental, given that it would be open to the parties to negotiate contracts incapable of being performed because at the end of the day that performance will be underwritten by a massive statutory insurance scheme’ (Law Reform Commission of Western Australia 1998: 97);³⁹⁰
- there is a likely risk that, via industry pressure, Government may be forced to subsidise premiums (Independent Pricing and Regulatory Tribunal of NSW 2000: 8);
and

³⁸⁹ See, for example, Independent Pricing and Regulatory Tribunal of NSW (2000: 9); WA Security of Payment Taskforce (2001: 14); Law Reform Commission of Western Australia (1998: 97); QBSA (2001: 6); Cole (2003: 249).

³⁹⁰ Citing the Queensland Government (1991: 58).

- the potential for lengthy litigation if large insurance companies resist claims from contractors pursuant to a principal payment default (Law Reform Commission of Western Australia 1995: 36).³⁹¹

5.5 Builders Licensing Requirements

Each of the Australian jurisdictions has legislation in place requiring the licensing, registration or accreditation of builders (individuals and companies) as a prerequisite to the carrying out or supervision of building works. Such licensing schemes generally ensure that building practitioners are competent, up to date with technical requirements, operate in a professional manner, appropriately insured, and required to comply with the relevant Code of Conduct (Stenning and Associates 2006: 29).

The extension of such builders licensing schemes to test the financial viability of building contractors – for example by setting minimum requirements with respect to financial skilling, management and financial backing – has been considered as an option to tackle the security of payment problem.³⁹² The potential, however, for enhanced licensing requirements *per se* to effectively address security of payment issues has been found to be limited. As stated by the QBSA (2001: 8):

licensing in itself is not an appropriate vehicle to deliver further improved security of payment outcomes for subcontractors. The licensing financial criteria is a “snap shot” back in time that all contractors have to satisfy on licence application, renewal or on request by the Authority under a compliance audit. This process can never reflect an absolute current position. In the building and construction industry a lot can change in one week ...

Although, as noted by Stenning and Associates (2006: 29):

It would be possible, however, to develop links between accredited building practitioner requirements and security of payment practices if there was a clear mechanism that enabled assessing whether accredited building practitioners had an adverse security of payment history. This

³⁹¹ Citing the Newfoundland Law Reform Commission (1990: 31). This limitation was originally identified in relation to the use of payment bonding (see Chapter 5.9), but equally applies to insolvency insurance.

³⁹² See, for example, WA Security of Payment Taskforce (2001: 17-18); Law Reform Commission of Western Australia (1995: 54-57); The Law Reform Commission of Western Australia (1998: 114); QBSA (2001: 8); Stenning and Associates (2006: 29); Cole (2003: 246-248).

is the situation in Queensland, where licensed builders are subject to a demerit points system and where demerit points can be awarded against licensees if they have adjudications made against them under Queensland's security of payments legislation.

Other arguments against the inclusion of financial criteria amongst licensing criteria identified by Cole (2003: Vol 8, 248) include the associated increase in administration costs adding to the costs of the industry, and risk that more onerous licensing requirements can create barriers to businesses setting up in the industry as well as reduce the flexibility of firms to take new and innovative approaches to business.

5.6 Codes of Practice

The effectiveness of industry codes of practice 'relies on parties observing good payment practices as a result of voluntary codes of industry practice or through quasi-mandatory codes imposed as a condition of funding and/or contracts' (Stenning and Associates 2006: 30).

Therefore, the ability to enforce industry codes of practice with respect to payment practices is limited, which severely weakens their effectiveness as a means for resolving the security of payment problem. As such, Cole (2003: 248) observed that 'there is little support for the view that codes of practice are likely to be an effective mechanism for bringing about security of payments reform.'

There is greater potential for codes of practice to be enforced on construction projects where there is public sector funding. On such projects the public funding body can insist on the adoption of codes of practice as a condition of funding. The WA Security of Payment Taskforce (2001: 14), for example, reports that the eight nationally agreed security of payment principles (see Table 5.1),³⁹³ set out in the National Code of Practice for the Construction Industry (Australian Procurement and Construction Council 1997: 9), 'were adopted with some degree of success by WA, South Australia, Tasmania and the

³⁹³ These eight principles were endorsed on 15 January 1996 by Commonwealth, State and Territory Ministers responsible for construction, as recorded in the *National Action on Security of Payment in the Construction Industry*, Australian Procurement and Construction Council (1996).

Northern Territory governments for government works, and had some effect in improving standards for private sector projects in those jurisdictions.³⁹⁴

Recognising the potential for codes of practice to have some limited, but positive, effect via adoption on publicly funded projects, Cole (2003: 249) recommended that:

The Commonwealth require, as a condition of the provision of Commonwealth funding to State or Territory projects, that tenderers be required to promote good payment practices to subcontractors on those projects.

Table 5.1 – National Security of Payment Principles, National Code of Practice for the Construction Industry
(Source: Australian Procurement and Construction Council 1997: 9)

NOTE:

This table is included on page 151 of the print copy of the thesis held in the University of Adelaide Library.

5.7 Prequalification Procedures

Prequalification is the process used to assess the capacity of a contractor to successfully complete a job (Price Waterhouse 1996: 115). In other words, prequalification aids in identifying the risk of contractor failure on a construction project (Price Waterhouse 1996: 16). The prequalification assessment carried out is used by clients and contractors to select firms for particular projects (Cole 2003: 245). An effective prequalification procedure

³⁹⁴ See Stenning and Associates (2006: 12) for a list of the national actions and strategies that have been applied across jurisdictions as a result of these principles.

involves the verification, review and assessment of current information on the financial, technical and management capacity of the contractor by competent assessors (Price Waterhouse 1996: 16). As Cole (2003: 245) stated, 'Prequalification can reduce the risk that the contractors chosen for the project will experience financial difficulty and then fail to pay subcontractors.'

Currently, the decision whether to carry out a prequalification process on construction projects is voluntary. In practice, the only level at which a full, formalised prequalification process occurs in the construction chain is between the principal and head contractor on public sector projects and on major projects in the private sector (Price Waterhouse 1996: 16 & 118). For smaller private sector projects, principals will usually reduce the prequalification procedures undertaken due to their more limited relative financial exposure (Price Waterhouse 1996: 16).

Where a principal has carried out a full prequalification procedure for head contractors on a construction project, subcontractors on the same project may generally rely on the principal's prequalification process to reduce the risk of head contractor failure (Price Waterhouse 1996: 131). However, for smaller private sector projects, which may still be significant in size for smaller subcontractors, subcontractors will not be able to place the same level of reliance upon the principal's prequalification procedure (Price Waterhouse 1996: 131). Further, due to limitations in the information available to subcontractors and their general ability to properly understand any financial information that may be obtained, prequalification of head contractors undertaken by subcontractors will not be an effective risk management tool (Price Waterhouse 1996: 17 & 131-132). Price Waterhouse (1996: 17) found, at the time, that for projects below \$5 million, prequalification is not an effective mechanism to protect subcontractors.

There have been recommendations against the mandatory adoption of prequalification procedures on construction projects (Cole 2003: 246; Price Waterhouse 1996: 114). Cole (2003: 246) found that it would not be 'practical for governments to require private sector clients to introduce prequalification on their own projects.' However, the promotion and encouragement of the voluntary use of prequalification procedures has been recommended (Price Waterhouse 1996: 16). Cole (2003: 246) viewed that governments, as major clients of the construction industry, could influence private sector behaviour with respect to

prequalification. As such he (2003: Vol 8, 246) recommended that , ‘All governments ... continue to monitor, review and improve their approach to prequalification with a view to improving security of payments within the building and construction industry.’

5.8 Proof of Payment

The possible incorporation of ‘proof of payment’ clauses into construction contracts by statute in order to shift the risks of non-payment away from subcontractors has been considered (Law Reform Commission of Western Australia 1998: 84-95; Price Waterhouse 1996: 55-79; Northern Territory Department of Justice 2002: 35). The effect of proof of payment clauses is to prevent a contractor from receiving payment from its principal until all its subcontractors have first been paid (Northern Territory Department of Justice 2002: 35). This ensures that payment reaches subcontractors at the earliest opportunity (Price Waterhouse 1996: 55).

Many standard forms of construction contract currently used in Australia already contain express clauses requiring head contractors to give proof of payment to the contract superintendent that all subcontractors have been paid all moneys due and payable in respect of the contract work.³⁹⁵ However, Price Waterhouse (1996: 58) found that:

the anecdotal evidence is that while they are relatively simple to administer, Statutory Declarations are not considered effective because of the many loopholes that are available in making a declaration in respect of payment.

Although there has been some support for all construction contracts to contain proof of payment clauses (Construction Industry Development Agency 1994: Recommendation 16; Price Waterhouse 1996:2³⁹⁶), several limitations associated with their use have been identified. These include that their use:

³⁹⁵ AS 2124-1992 clause 43, and PC-1 1998 clauses 12(e) and 12.20 require statutory declarations in this respect. Whilst ABIC MW-1 2003 Section N3.2 requires a declaration, it is not expressly required to be statutory. AS 4000-1997 clause 38.1 requires the contractor to provide documentary evidence of payment due to subcontractors which is to be to the superintendent’s satisfaction.

³⁹⁶ Price Waterhouse recommended that proof of payment be used, similar to the approaches used by Queensland Build and the Victorian Catholic Building Office, coupled with the use of a consensual dispute resolution mechanism.

- (i) ‘does not provide a means of keeping money within the contractual chain should one of the parties become bankrupt or insolvent after work has been done or materials supplied but before a payment is made’ (Law Reform Commission of Western Australia 1998: 87).
- (ii) ‘would increase the paperwork required at every step in the contractual chain’ (Law Reform Commission of Western Australia 1998: 87).
- (iii) is not effective because builders make false declarations with some impunity.³⁹⁷ In order to minimise the opportunities for fraud, a proof of payment system would need to require statutory declarations to be accompanied by receipts for payments to the subcontractors. This would further increase paperwork requirements (Law Reform Commission of Western Australia 1998: 87-88).
- (iv) would result in significant administrative costs for both principals and head contractors (Price Waterhouse 1996: 58).
- (v) would not ensure prompt payment to a subcontractor where the subcontractor’s payment claim is disputed by the head contractor (Price Waterhouse 1996: 55).
- (vi) would mean that, ‘Head contractors and others in the contractual chain would need to obtain finance or use their own capital to meet their payments before receiving payment from the party above them in the contractual chain’ (Law Reform Commission of Western Australia 1998: 87).

5.9 Other Measures to Address the Security of Payment Problem

Other measures which have been considered to address the security of payment problem include: payment bonding, direct payments, stop notices, holdbacks and covenanting.

As stated by the Law Reform Commission of Western Australia (1998: 77):

Under a payment bonding scheme an owner or a head contractor is required to obtain a bond from an insurance company or bank guaranteeing payment of the contractor and all subcontractors and employees.

³⁹⁷ As submitted to the Commission by the Master Painters, Decorators and Signwriters’ Association of Western Australia; The Master Plumbers and Mechanical Services Association of Western Australia; Western Power.

Payment bonding is, in effect, a form of insurance against payment defaults by contract principals. As such, whilst the use of a payment bonding scheme would help to prevent cascading contractor insolvencies due to payment defaults, it also shares the disadvantages³⁹⁸ listed in Chapter 5.4 which are associated with insolvency insurance.

A direct payment arrangement would involve the owner paying the subcontractors directly such that, by the terms of the contract, the head contractor acts purely as a manager for a percentage of the contract price (Law Reform Commission of Western Australia 1995: 39). The handling of the accounting requirements necessitated by such an arrangement, however, is likely only to be possible for large commercial owners (Law Reform Commission of Western Australia 1995: 39). Additionally, it is likely there would be increased potential for difficulties in the control of, and disputes relating to, the quality of the construction work where the person supervising the work of the subcontractors does not have a contractual relationship with them (Law Reform Commission of Western Australia 1995: 40; Northern Territory Department of Justice 2002: 35).

Statutory mandated stop notices issued by a subcontractor would require an owner to withhold monies owed by the builder in escrow to satisfy the claims of the subcontractor (Northern Territory Department of Justice 2002: 36). The withheld monies would be released if the head contractor pays the subcontractor (Law Reform Commission of Western Australia 1998: 97). If the head contractor does not pay the subcontractor, the subcontractor may acquire its part of the escrow account if either:

- it sues the head contractor; or
- the head contractor sues the owner, in which case the subcontractor is entitled to be made a party to the action (Law Reform Commission of Western Australia 1998: 97).

The Law Reform Commission of Western Australia (1998: 98-99) has identified several limitations in the use of stop notices, the most major being that stop notices provide no protection if the owner becomes bankrupt or insolvent. Other limitations identified include: the necessity for the owner to be indebted to the head contractor at the time the

³⁹⁸ With respect to additional costs to the construction industry, precluding smaller builders from the industry, and capacity for fraud.

stop notice is filed; the right to file stop notices being restricted to the head contractor's direct subcontractors, and not extending to subcontractors lower in the contracting chain; and the potential for stop notices to stem the flow of cash from the owner to the head contractor which may result in construction being halted.

Under a holdback scheme, the owner would be under a legal obligation to retain a percentage (for example 10%) for a period of time after the contract works have been completed (Law Reform Commission of Western Australia 1998: 99; Northern Territory Department of Justice 2002: 36). Subcontractors who have not been paid by the head contractor during the course of the construction works may claim on this 'holdback fund'. On the stipulated date, the holdback fund would be paid to the head contractor less any subcontractor claims which have been met (The Law Reform Commission of Western Australia 1998: 99). The use of holdback schemes to address the security of payment problem, however, was not recommended by the Law Reform Commission of Western Australia (1998: 99-100) for the following reasons:

1. It restricts the ready flow of some funds along the construction chain and could cause cash flow problems for contractors and subcontractors who must finance the difference between what is received and must be paid, for example, for labour and materials ...
2. It adds to the cost of a project ...
3. Undue reliance upon the holdback leads to poor business practices because proper credit checks are overlooked.

Covenanting would involve the payments to a head contractor being paid to a covenanting agency instead of directly to the head contractor (Law Reform Commission of Western Australia 1998: 83). The covenanting agency would then be responsible for distributing the money appropriately to the head contractor and subcontractors (Northern Territory Department of Justice 2002: 36). The Law Reform Commission of Western Australia (1998: 83-84) recommended against the adoption of covenanting to address the security of payment problem because of: the additional cost to the construction industry associated with the premium which would be charged by the covenanting agency; the administrative complexity necessary to ensure the covenanting agency had enough information to be able to calculate the fair distribution of payments; and the lack of protection provided to subcontractors if the owner became bankrupt or went into liquidation.

5.10 The Need for Security of Payment Legislation

Each of the options to improve security of payment in the construction industry discussed in this chapter has shortcomings, or limitations.

The liens and charges legislation operational in some States fails to obviate the need for claimant subcontractors to initiate court actions, which are likely to be costly and lengthy, in order to recover debts due. Additionally, the practical effectiveness of liens and charges legislation is generally tempered by strict technical requirements and the necessity for there to be money owing from the principal to its building contractor.

To varying degrees, criticisms of the other options to improve security of payment generally include:

- the necessity for complex and/or onerous technical and administrative requirements;
- the extra cost to the construction industry which would likely increase the costs of building projects, push some participants from the industry, and create barriers to entry for new participants;
- a lack of required existing financial skills in the construction industry;
- the adverse effect on cash flow throughout the contracting chain where the proposed option takes payments out of the contractors' hands;
- a lack of support across the construction industry; and
- a perceived ineffectiveness of the proposed measure.

These shortcomings, or limitations, have contributed to the parliaments in each of the eight Australian jurisdictions concluding that specific legislation is required to effectively tackle the security of payment problem. It is to that legislation which this thesis now turns its attention.

Chapter 6

Building and Construction Industry Security of Payment Legislation

6.1 Background

Over the past fourteen years, building and construction industry security of payment legislation has come into force in several of the Commonwealth jurisdictions. A list of the relevant Acts is presented in Table 6.1.

In May 1998, England and Wales and Scotland were the first jurisdictions to introduce the legislation into the building and construction industry by virtue of Part II of the *Housing Grants, Construction and Regeneration Act 1996*.³⁹⁹ Legislation very closely modelled on this Act commenced approximately one year later in Northern Ireland. Additions and amendments to all the UK Acts have recently been enacted.⁴⁰⁰ Due to the similarities of the UK legislation, the English and Welsh, Scottish and Northern Irish Acts shall henceforth be collectively referred to as the ‘UK Act’ or ‘UK legislation’.

The first Australian jurisdiction to introduce security of payment legislation was NSW which, as noted by Bell and Vella (2010: 567), despite basing its legislation broadly upon the provisions in the UK legislation, has significant differences in approach to the UK Act (as discussed further below). Subsequently, the NSW Act has formed the basis for the legislation enacted in most other Australian jurisdictions, culminating in the Tasmanian Act which received Royal Assent on 17 December 2009.⁴⁰¹

³⁹⁹ The impetus for the drafting and enactment of the United Kingdom legislation was the recommendations made by Sir Michael Latham (1994) in his report entitled *Constructing The Team*, which was the final report of a jointly commissioned government/construction industry review of procurement and contractual arrangements in the UK construction industry.

⁴⁰⁰ In England & Wales by way of Part 8 of the *Local Democracy, Economic Development and Construction Act 2009*, which came into force on 1 Oct 2011. In Scotland by way of *The Local Democracy, Economic Development and Construction Act 2009 Commencement No.2) (Scotland) Order 2011*, which came into force on 1 Nov 2011. In Northern Ireland by way of the *Construction Contracts (Amendment) Act (Northern Ireland) 2011*, yet to commence.

⁴⁰¹ Although the Tasmanian Act commenced operation before the ACT and SA Acts, it was actually the last Act to be passed in Australia.

Harmonisation of Security of Payment Legislation

Table 6.1 – Enacted Building and Construction Industry Security of Payment Legislation

Jurisdiction	Legislation	Date of Commencement
England and Wales	Part II of <i>The Housing Grants, Construction and Regeneration Act 1996</i>	1 May 1998 ⁴⁰²
Scotland	<i>The Housing Grants, Construction and Regeneration Act 1996 (Scotland) (Commencement No. 5) Order 1998</i>	1 May 1998
Northern Ireland	<i>The Construction Contracts (Northern Ireland) Order 1997</i>	1 June 1999
New South Wales (NSW)	<i>Building and Construction Industry Security of Payment Act 1999</i>	26 March 2000
Victoria	<i>Building and Construction Industry Security of Payment Act 2002</i>	31 January 2003
New Zealand (NZ)	<i>Construction Contracts Act 2002</i>	1 April 2003
Queensland	<i>Building and Construction Industry Payments Act 2004</i>	1 October 2004
Isle of Man	<i>Construction Contracts Act 2004</i>	1 June 2004
Western Australia (WA)	<i>Construction Contracts Act 2004</i>	1 January 2005
Singapore	<i>Building and Construction Industry Security of Payment Act 2004</i>	1 April 2005
Northern Territory (NT)	<i>Construction Contracts (Security of Payments) Act</i>	1 July 2005
Tasmania	<i>Building and Construction Industry Security of Payment Act 2009</i>	17 Dec 2009
Australian Capital Territory (ACT)	<i>Building and Construction Industry Security of Payment Act 2009</i>	1 July 2010
South Australia (SA)	<i>Building and Construction Industry Security of Payment Act 2009</i>	10 Dec 2011

In addition to the UK and Australian jurisdictions, security of payment legislation has been enacted in NZ, Isle of Man and Singapore. The NZ Act drew its ideas from both the UK and NSW Acts (Kennedy-Grant 2005: 16). The Isle of Man Act is closely modelled

⁴⁰² The provisions of Part II of *The Housing Grants, Construction and Regeneration Act* did not commence in England and Wales until 1 May 1998 when *The Scheme for Construction Contracts (England and Wales) Regulations 1998* came into force.

on the UK Act.⁴⁰³ The Singapore Act was modelled on the NSW Act in preference to the UK Act.⁴⁰⁴

The *Construction Contracts Bill 2010* was introduced into the Irish Parliament in May 2010.⁴⁰⁵ The Irish Bill was passed by the Seanad (upper house of the Irish Parliament) in March 2011 and, at time of writing, is yet to be passed by the Dáil (lower house of the Irish Parliament). It is interesting to note that having had the benefit of being able to review the performance of the existing security of payment legislation internationally, Ireland has chosen to follow the legislative approaches to be found in the UK Act as opposed to the differing approaches to be found in the NSW Act.

Furthermore, a draft Malaysian *Construction Industry Payment and Adjudication Act*⁴⁰⁶ was published in September 2009 which, at time of writing, is still pending.

A common objective of all of the legislation has been the eradication of unfair contractual provisions and practices with regards to payment. The aim is to get cash flowing in as fair a manner as possible down the hierarchical contracting chains that exist on most commercial construction projects. In order to achieve this objective, all the legislation has included, in one form or another, core provisions which:

- (i) prohibit clauses in construction contracts that make payment conditional on the payer receiving payment from a third person,⁴⁰⁷ eg ‘pay when paid’ or ‘pay if paid’ clauses (as discussed in Chapter 4.3.3 above);
- (ii) establish a default right to stage, or progress, payments if the parties have failed to agree that in the construction contract;⁴⁰⁸

⁴⁰³ As such, the Isle of Man Act will not be dealt with separately in the legislative comparison that follows.

⁴⁰⁴ According to Chan (2006: 248), the NSW Act’s focus on payment disputes as opposed to the UK Act’s much wider scope of disputes, better serves the need of the Singapore construction industry which has been ‘plagued by a great number of contractors and subcontractors becoming insolvent because cash flow could not be maintained as payments were withheld.’

⁴⁰⁵ The Irish Bill can be downloaded from The Houses of the Oireachtas website at <http://www.oireachtas.ie/documents/bills28/bills/2010/2110/b2110s.pdf>, viewed 14 June 2012.

⁴⁰⁶ Available at http://www.cidb.gov.my/v6/files/Draft_CIPAA_010909.pdf, viewed 14 June 2012.

⁴⁰⁷ See, for example, UK Act, s 113; NSW Act, s 12; WA Act, s 9. The NSW, Victorian, Queensland, South Australian, Tasmanian, ACT and UK Acts further prohibit clauses which makes payment conditional upon contractual certification.

- (iii) prescribe how the amount of stage/progress payments are to be valued and the intervals in which they become due in the absence of prior agreement between the parties;⁴⁰⁹
- (iv) require prior notice to be given of reasons for withholding payments, in order for set-off to be permissible;⁴¹⁰
- (v) establish the right to suspend performance of contractual obligations for non-payment;⁴¹¹ and
- (vi) establish a right to refer a dispute arising under the contract to a process of rapid adjudication for determination,⁴¹² which shall have binding effect in the interim pending an award in a more formal dispute resolution process such as litigation or arbitration.⁴¹³

Despite these common provisions, the Acts vary with respect to ‘policy, procedure, terminology and physical layout’ (Speranza 2011: 170). In particular, key differences exist between certain of the Acts in relation to the scope of disputes covered, and the statutory progress payment systems and adjudication schemes prescribed. These key differences are summarised in Table 6.3 towards the end of this chapter.⁴¹⁴

As the scope of this thesis is generally limited to a consideration of the Australian legislation, this chapter will initially compare and contrast comprehensively the key substantive and procedural differences between the various Australian statutes. However, in order for any proposal for Australian harmonisation to be fully informed, it cannot ignore similar legislation in international jurisdictions from which lessons may be learned. Therefore, the chapter progresses to provide a comparative overview between the Australian and the international legislation. The chapter concludes by considering the

⁴⁰⁸ UK Act, s 109(1); NSW Act, s 8; WA Act, s 15.

⁴⁰⁹ UK Act s 109(3); NSW Act, s 10 ;WA Act, s 14.

⁴¹⁰ UK Act, s 111; NSW Act, s 14; WA Act, s 17.

⁴¹¹ UK Act, s 112; NSW Act, ss 15, 24(1)(b); WA Act, s 42.

⁴¹² UK Act, s 108(1); NSW Act, s 17; WA Act, s 25.

⁴¹³ The rapid and interim nature of adjudication has led to it being referred to as a ‘pay now, argue later’ scheme (Ackner 1996: Cols 989-990).

⁴¹⁴ Catherine Bell (2010) has published a similar comparative table for the Australian legislation.

degree to which each of the legislative models interferes with the contracting parties' freedom of contract.

6.2 Overview of the Key Differences between the Australian Legislative Models

In the Australian context, key differences between the Western Australia (WA) and Northern Territory (NT) Acts on the one hand and the other Australian Acts on the other have led many commentators to distinguish two broad legislative models. As such, the WA and NT Acts have been collectively labelled the 'West Coast' model legislation, as opposed to the 'East Coast' model tag given to the other Australian Acts.⁴¹⁵

For the sake of convenience, this thesis will henceforth adopt the East Coast and West Coast model terminology. Furthermore, as the inaugural Australian Acts for each model, the provisions of the NSW and WA Acts are generally referred to as representative of the Australian East and West Coast models respectively, although any significant intra model deviations from the NSW and WA Acts will be noted.

The key differences between the East and West Coast models have been broadly summarised by Coggins, Fenwick Elliott and Bell (2010: 15) as follows:

1. The East Coast model Acts provide a detailed statutory payments regime, overriding any inconsistent contractual provisions, which parties undertaking "construction work" or "related goods and services" may choose to engage by submitting a payment claim under the Act at regular intervals and have it responded to within a certain timeframe. Conversely, the West Coast model Acts largely preserve (rather than override) the parties' contractual interim payment regimes.
2. The East Coast model Acts only allow for payment claims to be made up the "contractual stream" (typically by a subcontractor against its head contractor, or head contractor against its principal). Conversely, the West Coast model allows for payment claims both up and down the "contractual stream".

⁴¹⁵ As previously noted in Chapter 1, although this terminology no longer is accurate from a geographical standpoint, its use was initially adopted at a time when only the NSW, Victorian, Queensland, WA and NT Acts had been enacted (Bell and Vella 2010: 566). See, for example, the report prepared for the Tasmanian Government by Stenning and Associates (2006); Xenophon (2007) in his Second Reading Speech for the first version of the Bill for the SA Act.

3. Whilst both models allow for a statutory adjudication scheme to determine, in the interim, disputed payment claims, they differ with respect to adjudicator appointment, submissions which may be considered by an adjudicator, and the approach which an adjudicator is to adopt in order to arrive at his or her determination. In all of these respects the East Coast Acts are more restrictive, disallowing mutual agreement of an adjudicator, consideration of reasons for withholding payment which have not been duly submitted in accordance with the statutory payment scheme, and discouraging an evaluative approach to adjudicators' determinations.

These and other differences are further discussed below in a comparative review of the two Australian legislative models with respect to legislative objective, scope of coverage, payment systems and adjudication schemes, adjudicator appointment, adjudicators' determinations and their enforcement, statutory rights to appeal adjudicators' determinations, and 'no contracting out' provisions.

6.3 Legislative Objectives

Despite their differences, the common objective of the raft of Australian Acts, apparent from the Second Reading Speeches in the respective Parliaments,⁴¹⁶ is to facilitate the flow of cash in a swift manner down the hierarchical contracting chains that exist on construction projects.

In his Second Reading Speech for the NSW Bill, the then Minister for Public Works and Services, Mr Morris Iemma (1999: 1594-1595), stated that the aim of the Bill was to provide a 'quicker and cheaper means of enforcing payment' without adding 'unnecessary cost to [the] industry.' The focus of Mr Iemma's speech was very much on protecting the small subcontractor. As Mr Iemma (1999: 1594) stated:

It is all too frequently the case that small subcontractors – such as bricklayers, carpenters, electricians and plumbers – are not paid for their work. Many of them cannot survive financially when that occurs, with severe consequences for themselves and their families.

⁴¹⁶ ACT (Hargreaves J, 15 October 2009); NSW (Iemma M, 29 June 1999); NT (Toyne P, 14 October 2004); Queensland (R E Schwarten, 18 March 2004); SA (Kenyon T, 5 March 2009); Tasmania (Singh L M, 4 November 2009); Victoria (Delahunty M, 21 March 2002); WA (MacTiernan A J, 3 March 2004).

A similar focus was evident in the Second Reading Speeches for the Victorian Bill given by the then Minister for Planning, Ms Mary Delahunty, and the Queensland Bill given by the then Minister for Public Works, Housing and Racing, Mr Robert Schwarten.

Ms Delahunty (2002: 427) stated:

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.

Mr Schwarten (2004: 71-72) stated that, ‘Security of payment has been an issue for many decades, particularly in relation to subcontractors’ and continued, ‘The building and construction industry, and particularly subcontractors will benefit substantially from the introduction of this Bill.’

Despite this focus on small subcontractors, however, the apparent intent of the East Coast legislation is far wider ranging, affording protection to all parties who carry out work (or supply goods and services), regardless of size, in the construction industry. As Mr Iemma (1999: 1595) noted in his Second Reading Speech for the NSW Bill:

The bill covers civil engineering as well as architectural work, mechanical and electrical work in buildings, maintenance, and landscaping and decorating. It affects all parties who contract for that work, including owners, contractors, subcontractors and consultants, and applies to both commercial and residential work.

Accordingly, the object of the East Coast model legislation 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 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.⁴¹⁷

⁴¹⁷ NSW Act, s3(1).

The other Australian Acts have similarly wide ranging aims. As noted by Bell and Vella (2010: 568):

Such a [wide-ranging] reform intent is indicated not only ... in the Minister's [Mr Iemma's] comments, but also in the Second Reading Speeches for the other Australian Acts, and in the objects provisions for the Acts, each of which is widely cast as to the participants within the industry at whom the Act is directed.

The East Coast model legislation was only intended to cover payment claims regarding the value of construction work carried out and/or related goods and services. As such, the role of an adjudicator under the East Coast model is to assess the quantity of construction work undertaken (or related goods and services supplied) and whether such work (or goods and services) accords with the contract requirements in terms of scope and quality, and value such work at the applicable contract prices or rates.⁴¹⁸ Payment claims under the East Coast model are not intended to cover amounts for damages within the scope of the contract (eg, delay damages and liquidated damages), disputes over which tend to be more complex in nature.⁴¹⁹ As Philip Davenport (2007: 23), who was engaged by the NSW Government to assist in the drafting and implementation of the NSW Act (Bell and Vella (2010: 573), states, 'adjudication of a progress claim is a fast track process that is not suitable for deciding issues of breach of contract, extensions of time, repudiation and termination, causation, quantification of damages etc.' As such, the Australian East Coast model's adjudication scheme is essentially an independent certification process for progress payment claims (Davenport 2007: 13) as opposed to a dispute resolution process for payment claim disputes.

In his Second Reading Speech for the NSW Bill, Mr Iemma (1999: 1598) made it clear that the 'bill does not specifically provide for an appeal from an adjudicator's decision ... between the adjudicator's interim decision and the final decision [in legal proceedings or in a binding dispute resolution process]' because to do so 'would be unnecessarily burdensome and costly for parties to construction contracts and 'also be a source of abuse by a desperate respondent seeking to delay payment.' As such, the Honourable Justice

⁴¹⁸ NSW Act, s 10(1)(b)(i), (ii) & (iii).

⁴¹⁹ *Coordinated Construction Co v J M Hargreaves and Ors* [2005] NSWSC 77 at [40]; *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 per Barrett J at [34].

Robert McDougall (2009: 9) notes ‘that parliament specifically wished for the courts not to be too readily involved.’

In her Second Reading Speech for the WA Bill, the then Minister, Ms Alannah MacTiernan (2004: 274), also referred to the vulnerability of subcontractors (see Chapter 4.3.1). Ms MacTiernan (2004: 275) also implied, however, that the WA legislation was intended for a wide range of contractual claims, ranging from small to complex, when she stated that the

primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims.

This is consistent with the West Coast model legislation allowing for either contracting party to apply for adjudication for damages claims, the recovery of which is within the scope of the contract provisions, as well as progress payment claims.

6.4 Scope of Coverage

Both the East and West Coast models cover contracts under which one party undertakes to carry out construction work, or to supply related goods and services,⁴²⁰ for another person.⁴²¹ In addition to contracts, the East Coast model Acts cover ‘other arrangement[s]’, and the West Coast model Acts cover ‘other agreement[s]’. With respect to the East Coast model terminology, Davenport (2010a: 27) explains:

An arrangement can comprise many contracts, for example, where the claimant makes a standing offer to provide tiling work, whenever the respondent requests, at any site where the respondent is carrying out construction work.

⁴²⁰ The NSW Court of Appeal has ruled that this extends to including a construction management agreement with risk/reward payment terms – see *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31.

⁴²¹ NSW Act, s 3(1); WA Act ss 3, 7(1).

Speranza (2011: 171) summarises the definitions of construction work under both models as follows:⁴²²

Both the East and West coast models broadly define “construction work” as including “site preparation, actual construction, repair, renovation, design, drafting and management”. Nonetheless, there are a few express exclusions. Both models exclude work relating to the extraction of oil or natural gas and the mining of minerals. However, the West coast model takes it one step further and expressly rules out the construction of plants for the purpose of extracting oil or minerals. Also, the West coast model precludes the construction, restoration or alteration of wholly artistic work and watercraft.

By and large, both models define “related goods” as construction materials and define “related services” to include architectural, design, surveying, engineering and interior or exterior decoration advisory services.

Although work involved in the extraction of minerals is not covered by the legislation, it is worth noting that the Queensland Supreme Court has held that work associated with such extraction, such as the stripping or removal of topsoil down to the minerals, is covered.⁴²³

Both the East and West Coast model Acts:

- cover contracts which are written or oral, or partly written and partly oral;⁴²⁴
- cover contracts which are governed by a law of a jurisdiction other than their own;⁴²⁵
- exempt contracts of employment;⁴²⁶ and
- bind the Crown.⁴²⁷

⁴²² For a more detailed comparison of the differences between the definitions of construction work between the East and West Coast models, see Coggins, Fenwick Elliott and Bell (2010: 16-19).

⁴²³ See *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2001] QSC 345; *HM Hire Pty Ltd v National Plant & Equipment Pty Ltd* [2012] QSC 004.

⁴²⁴ NSW Act, s 7(1); WA Act, s 7(2)(a).

⁴²⁵ NSW Act, s 7(1); WA Act, s 7(2)(c).

⁴²⁶ NSW Act, s 7(3)(a); WA Act, s 7(3).

⁴²⁷ NSW Act, s 33; WA Act, s 8.

The East Coast model Acts generally do not cover ‘contracts which are essentially only loan agreements’ (Davenport 2010a: 33) or contracts to provide indemnities with respect to construction work carried out or related goods and services provided.⁴²⁸ There are no similar provisions in the West Coast model Acts.

The East Coast model provides for recovery of ‘purely progress payment claims’ (Davenport 2007: 15) under the contract only, ie for construction work undertaken or goods and services supplied under the contract.⁴²⁹ Thus, by definition, the East Coast model only allows for contractors or suppliers to make payment claims against their principals (ie upstream claims). The East Coast model does not allow principals to make payment claims for money they claim is owed to them by their contractors or suppliers (eg, for liquidated damages).

The scope of the West Coast model is wider, providing the right for either party to make an adjudication application in relation to any payment disputes falling within the scope of the building contract.⁴³⁰ This includes, for example, damages claims (eg, contractors’ claims for delay and disruption costs caused by principals, and principals’ claims for liquidated or general damages for a contractor’s delay in achieving practical completion) in addition to purely progress payment claims.

Both the East and West Coast models only cover contractual payments. Thus, as Davenport (2010a: 78-79) states:⁴³¹

Claims based upon tort or breach of statute, for example, misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act* (Cth) [now s 18, Schedule 2 of the *Competition and Consumer Act 2010*] cannot be made under an SOP Act. Claims for a quantum based on unjust enrichment cannot be made but claims made under a construction contract where the value of work is calculated as a quantum meruit can be made.

⁴²⁸ NSW Act, ss 7(2)(a), 7(3)(b), 7(3)(c).

⁴²⁹ NSW Act, s 8(1).

⁴³⁰ WA Act, s 25.

⁴³¹ Citing *Watpac Constructions v Austin Corp* [2010] NSWSC 168 as an example of claims for quantum meruit on the basis of unjust enrichment being disallowed under the Act by the court.

Whilst Davenport was referring to the East Coast Acts, his statement equally applies to the West Coast legislation.

With the exception of the Tasmanian Act, the East Coast model Acts do not apply to contracts ‘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’ (‘home owners’).⁴³² Thus, residential building contractors who contract directly with home owners are not able to benefit from the legislation.⁴³³ Subcontractors (or suppliers) of residential building contractors are, however, covered by the legislation. The Queensland Building Services Authority (QBSA) (2010: 5) explains that ‘the exemption of home owners from claims for payment under domestic building contracts is based on the presumption that consumers require a greater degree of protection than commercial operators.’

According to the QBSA (2010: 5), the exemption of home owner contracts

appears to be inconsistent with the BCIPA [the Queensland Act] objectives, to provide better outcomes for the industry, particularly since subcontractors and suppliers may make payment claims under BCIPA against a head contractor for domestic building work.

The Tasmanian Act prescribes the same East Coast model type statutory payment system (as discussed further in Chapter 6.5 below) for home owners as it does for commercial operators. It does, however, make one concession for home owners in that ‘a home owner has 20, rather than 10, business days to consider the content of a payment claim’ (Speranza 2011: 187).

The West Coast model does not exclude home owners from its operation.

⁴³² NSW Act, s 7(2)(b). The Queensland Act, s 3(2)(b) differs slightly in that it provides such contracts are exempt ‘to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside.’

⁴³³ This extends to a tripartite arrangement wherein one of the parties for whom work at a premises is being carried out proposes to reside in the premises – see *Levadetes Pty Ltd v Iberian Artisans Pty Ltd* [2009] NSWSC 641; *McFadden v Turnbull* [2011] NSWSC 1294.

6.5 Payment Systems and Adjudication Schemes

Both the East and West Coast models create a statutory entitlement for a contractor (or supplier) to receive progress payments for construction work carried out (or related goods and services supplied) under a construction contract.⁴³⁴

Progress payments are defined in the East Coast legislation as including:⁴³⁵

- (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
- (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
- (c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”).

The West Coast model contains no specific definition of progress payments.

In the absence of express contractual provision, both models provide default provisions stating the dates when progress payment claims may be made (‘reference dates’),⁴³⁶ how their amounts are to be valued,⁴³⁷ and when they are to be paid.⁴³⁸ In the East Coast model, these default provisions are contained within the main body of the Act, whereas in the West Coast model they are contained in a Schedule at the back of the Act.

Unlike the West Coast model, the East Coast model creates a separate statutory payment system which exists alongside the parties’ contractual payment regime.⁴³⁹ Thus, a dual payment system is established which has been described as a ‘dual railroad track system’.⁴⁴⁰ In order to engage the East Coast model’s statutory payment system, a

⁴³⁴ NSW Act, s 8; WA Act, s 14.

⁴³⁵ NSW Act, s 4.

⁴³⁶ NSW Act, s 8; WA Act, s 15 and Schedule 1 Division 3, s 3.

⁴³⁷ NSW Act, ss 9 & 10; WA Act, s 16 and Schedule 1 Division 4, s 5(3)(b).

⁴³⁸ NSW Act, s 11; WA Act, s 18 and Schedule 1 Division 5, s 7(3).

⁴³⁹ *Beckhaus v Brewarrina Council* [2002] NSWSC 960 per Maccready AJ at [60].

⁴⁴⁰ *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [56].

claimant needs to serve a payment claim on its principal ('the respondent').⁴⁴¹ The claim must state that it is made under the Act.⁴⁴² Only a claimant who has engaged the statutory payment system in this way may subsequently make an adjudication application under the East Coast model.

The East Coast model's default payment provisions, as discussed above, attach themselves to the making of a statutory payment claim, and not a contractual payment claim. Even where a construction contract provides for such payment provisions, the East Coast model's dual payment system allows a claimant contractor to make a separate statutory payment claim. As Macready AJ states, 'The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.'⁴⁴³ Where a certificate of value for progress payment has been duly issued under the contract, such certification has been held by the courts not to be binding on an adjudicator.⁴⁴⁴

Where the contract does contain payment provisions, the timing with respect to the East Coast model's statutory rights to make progress payment claims and the due date for their payment is fixed by reference to the contractual dates for making claims.⁴⁴⁵ Furthermore, the amount of statutory payment claims is to be valued in accordance with the contractual terms where they are provided.⁴⁴⁶ As Macready AJ comments, 'the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion ...'⁴⁴⁷ As discussed further in Chapter 6.9 below, however, if the contractual payment provisions fall foul of the East Coast model's 'no contracting out' provisions, then they are likely to be rendered void.⁴⁴⁸

This means that a claimant contractor that wants to avail itself of the full payment protection afforded by the East Coast legislation must submit a statutory, in addition to a

⁴⁴¹ NSW Act, s 13(1).

⁴⁴² NSW Act, s 13(2)(c).

⁴⁴³ *Beckhaus v Brewarrina Council* [2002] NSWSC 960 at [62].

⁴⁴⁴ *John Holland Pty Limited v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19 at [38].

⁴⁴⁵ *Beckhaus v Brewarrina Council* [2002] NSWSC 960 at [61] to [62].

⁴⁴⁶ *Ibid* at [61].

⁴⁴⁷ *Ibid* at [60].

⁴⁴⁸ NSW Act, s 34.

contractual, progress payment claim. In practice, as explained by Macready AJ,⁴⁴⁹ there is no reason why the two claims cannot be made at the same time, as long as the statutory claim complies with the requirements of the Act (as discussed below) and, on its face, the progress payment claim document appears to be both contractual and statutory.

The West Coast model does not operate a dual payment system, but rather payment claims referred to in the Act are those made under the contractual regime. If the contract does not have a written provision about how a party is to make a claim to another party for payment or how a party is to respond to a claim for payment, then default payment procedure provisions contained in the Schedule to the Act are implied into the contract.⁴⁵⁰

Under the East Coast model default provisions, the reference date upon which a contractor (or supplier) is allowed to submit a payment claim is 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 the last day of each subsequent named month.⁴⁵¹ Payment claims may only be served within 12 months after the construction work (or related goods and services) to which the claim relates was last carried out (or supplied) or, if the construction contract provides for a later date, the period determined in accordance with the contract.⁴⁵²

The amount of progress payments under the East Coast model default provisions is to be valued 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

⁴⁴⁹ *Beckhaus v Brewarrina Council* [2002] NSWSC 960 at [65].

⁴⁵⁰ WA Act, s 16 and Schedule 1 Division 4, s 17 and Schedule 1 Division 5.

⁴⁵¹ NSW Act, s 8(2)(b). However, under the Victorian Act, s 9(2)(b) the reference date for submission of the first payment claim is 20 business days after construction work was first carried out under the contract, and for subsequent payment claims is the date occurring 20 business days after the previous reference date.

⁴⁵² NSW Act, s 13(4).

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(iv) if any of the work is defective, the estimated cost of rectifying the defect.⁴⁵³

Therefore, the East Coast model default provisions only allow a respondent to set-off the estimated cost of rectifying defective work and not other possible set-offs such as liquidated damages. Even where a construction contract provides for setting off an amount due to the respondent, Davenport (2010a: 84) notes:

The problem with this is that until the amount due has been finally determined (for example, by expert determination, arbitration or litigation), there is not an amount due but only an amount claimed to be due, that is, an unliquidated amount. The consequence is that the respondent usually is not entitled to a set-off at the time the payment claim is made by the claimant.

With respect to the valuation of payment claims, the Victorian Act is unique amongst the East Coast model Acts in that it defines:

- claimable variations, which may be taken into account in calculating the amount of a progress payment;⁴⁵⁴ and
- excluded amounts, which must not be taken into account in calculating the amount of a progress payment.⁴⁵⁵

The definition of claimable variations is detailed and somewhat complex. As summarised by Bell and Vella (2010: 574):

“claimable variations” are defined as variations falling into one of two classes. The first is where all the key matters have been agreed ... the second depends on the original contract price under the contract: if less than \$150,000, there is no limit to the number of class two variations which can be claimed; if between \$150,000 and \$5m, 10% of the contract price can be claimed; and if the price exceeds \$5m and there is a dispute resolution mechanism in the contract, no class two variations may be claimed.

Furthermore, the Victorian Supreme Court has held that a variation is only agreed, and therefore claimable, for the purposes of the first class of variations where an agreement is

⁴⁵³ NSW Act, s 10.

⁴⁵⁴ Victorian Act, ss 10(2), 10A.

⁴⁵⁵ Victorian Act, ss 10(3), 10B.

arrived at before serving the relevant payment claim in which a claim for an allegedly claimable variation is made.⁴⁵⁶

Bell and Vella (2010: 574) note that excluded amounts under the Victorian Act include:

- variations (other than “claimable variations”);
- amounts “claimed under the construction contract for compensation due to the happening of an event” (including in respect of latent conditions, delay costs and changes in regulatory costs but, again, excluding amounts incorporated into claimable variations);
- claims for damages; and
- claims outside the construction contract.

These excluded amounts, and the imposing of caps on the amount of claimable variations particularly on larger contracts, appear to represent an attempt to limit the use of the East Coast model in Victoria to the recovery of purely progress payment claims and in a manner favourable to claims on smaller construction contracts.

With respect to these limiting provisions, Vickery J has stated that:

The rationale behind limiting the types of claims which may be made for variations under the Act, lies in the fact that money claims for variations to construction contracts are commonly the subject of dispute. No doubt for this reason, it was considered by the Legislature to be desirable for such claims to be excluded from progress claims made under the Act. In this way, the central object of maintaining an efficient flow of funds to contractors on a project could be optimized by eliminating potential “log jams” to payment claims arising from disputes over variations. Such issues, if they arise, are intended to be deferred to later dispute resolution processes or litigation.⁴⁵⁷

These limiting provisions were introduced into the Victorian Act in 2007 as amendments,⁴⁵⁸ and have been described as ‘complicated’, and making the Victorian Act post-2007 ‘labyrinthine’ in nature (Bell and Vella 2010: 574).

⁴⁵⁶ *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 at [53].

⁴⁵⁷ *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 at [34].

⁴⁵⁸ By way of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic).

The default due date for payment of progress claims under the East Coast model is the date occurring 10 business days after a statutory payment claim is made.⁴⁵⁹

Under the West Coast model, if the contract does not provide a means of calculating it, the amount claimed in a progress payment claim must be:

- (i) If the contract states the contractor is to be paid a lump sum for performance of all its contractual obligations, ‘the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations’;⁴⁶⁰
- (ii) if the contract states that the contractor is to be paid in accordance with rates specified in this contract, ‘the value of the obligations performed and detailed in the claim calculated by reference to those rates’;⁴⁶¹ or
- (iii) ‘in any other case — a reasonable amount for the obligations performed and detailed in the claim.’⁴⁶²

Unlike the East Coast model, the West Coast model allows for the principal to make a payment claim under the Act ‘for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under ... [the] contract.’⁴⁶³

In the absence of a written contractual provision about the time by when a payment must be made under the West Coast model, payment must be made within 28 days after a party receives a payment claim.⁴⁶⁴ The West Coast model also requires that if the contract purports to require a payment to be made more than 50 days after the payment is claimed,

⁴⁵⁹ NSW Act, s 11(1)(b). The SA Act deviates from the other East Coast model Acts, allowing 15 business days – SA Act, s 11(1)(b).

⁴⁶⁰ WA Act, s 16 and Schedule 1 Division 4, s 5(3)(b)(i).

⁴⁶¹ WA Act, s 16 and Schedule 1 Division 4, s 5(3)(b)(ii).

⁴⁶² WA Act, s 16 and Schedule 1 Division 4, s 5(3)(b)(iii).

⁴⁶³ WA Act, Schedule 1 Division 5, s 6(b). In this respect, the wording of the NT Act, Schedule Division 4, s 5(1)(g), differs stating that a claim by the principal must describe the basis for the claim in sufficient detail for the contractor to assess the claim.

⁴⁶⁴ WA Act, s 18 and Schedule 1 Division 5, s 7(3).

it is to be read as being amended to require the payment to be made within 50 days after it is claimed.⁴⁶⁵

A statutory payment claim under the East Coast model:⁴⁶⁶

- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
- (b) must indicate the amount of the progress payment that the claimant claims to be due (the “claimed amount”), and
- (c) must state that it is made under this Act.

A claimant is not permitted to serve more than one statutory payment claim in respect of each reference date.⁴⁶⁷ However, a claimant is allowed to include in a payment claim an amount which has been the subject of a previous claim.⁴⁶⁸ Under the East Coast model’s statutory payment system, a respondent has up to 10 business days⁴⁶⁹ after the payment claim is served to serve a payment schedule indicating the amount of the payment it proposes to make. If the scheduled amount is less than the claimed amount, the schedule must give reasons for withholding payment.⁴⁷⁰ If the respondent either schedules an amount less than the payment claim or fails to pay the whole or part of the scheduled amount by the due date, the claimant may make an adjudication application under the Act.⁴⁷¹

Where a lesser amount is scheduled and paid, the claimant must make an adjudication application to an Authorised Nominating Authority (ANA) of their choice,⁴⁷² with a copy served on the respondent,⁴⁷³ within 10 business days⁴⁷⁴ after receiving the payment

⁴⁶⁵ WA Act, s 10.

⁴⁶⁶ NSW Act, s 13(2).

⁴⁶⁷ NSW Act, s 13(5).

⁴⁶⁸ NSW Act, s 13(6).

⁴⁶⁹ Except in the SA Act which allows 15 business days – SA Act, s 14(4)(b)(ii).

⁴⁷⁰ NSW Act, s 14(3).

⁴⁷¹ NSW Act, s 17(1).

⁴⁷² NSW Act, s 17(3)(b).

⁴⁷³ NSW Act, s 17(5).

⁴⁷⁴ NSW Act, s 17(3)(c).

schedule.⁴⁷⁵ The respondent then has either a period of 5 business days⁴⁷⁶ after receiving a copy of the application or 2 business days⁴⁷⁷ after receiving notice of an adjudicator's acceptance of the application, whichever is the later, to lodge an adjudication response with the adjudicator.⁴⁷⁸

Where the respondent fails to pay the whole or part of the scheduled amount by the due date, the claimant may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or supplying related goods and services) under the contract.⁴⁷⁹ Such a claimant may pursue one of two alternative paths available under the Act in order to recover the outstanding payment claim. The first path is for the claimant to seek summary judgment in court for the debt due,⁴⁸⁰ in which case the Act provides anti-suit provisions which disallow the respondent from bringing any cross-claim against the defendant in the summary judgment proceedings, or raising any defence in relation to matters arising under the construction contract.⁴⁸¹ The second path is for the respondent to apply for the payment claim to be determined in adjudication,⁴⁸² in which case the claimant must make an adjudication application to an ANA within 20 business days after the due date for payment.⁴⁸³

If the respondent does not duly provide a payment schedule, it becomes liable to pay the claimed amount on the due date for the progress payment.⁴⁸⁴ Where no payment schedule is provided and the respondent fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment, the claimant may serve notice of its intention to suspend carrying out construction work (or supplying related goods and

⁴⁷⁵Except in the SA Act which allows 15 business days –SA Act, s 17(3)(c).

⁴⁷⁶ Except in the Tasmanian Act (7 business days) and ACT Act (10 business days).

⁴⁷⁷ Except in the Tasmanian Act (5 business days) and ACT Act (5 business days).

⁴⁷⁸ NSW Act, s 20(1).

⁴⁷⁹ NSW Act, s 16(2)(b). The claimant's right to actually suspend work under the contract is set out in s 27 of the NSW Act (as discussed in Chapter 6.7).

⁴⁸⁰ NSW Act, s 16(2)(a)(i).

⁴⁸¹ NSW Act, s 15(4)(b).

⁴⁸² NSW Act, ss 16(2)(ii) and 17(1)(a)(ii). In practice, the majority of claimant's choose this second path as it is generally speedier to enforce an adjudicator's determination under the Act (as discussed further in Chapter 6.7) than seek summary judgment from the court.

⁴⁸³ NSW Act, s 17(3)(d).

⁴⁸⁴ NSW Act, s 14(4)(b).

services) under the contract⁴⁸⁵ and may pursue one of the two alternative paths described in the paragraph above (ie, seek summary judgment in court for the debt due,⁴⁸⁶ or make an adjudication application⁴⁸⁷) in order to recover the outstanding payment. If the claimant wishes to make an adjudication application, it must:

- notify the respondent, within the period of 20 business days⁴⁸⁸ immediately following the due date for payment, of its intention to apply for adjudication of the payment claim;⁴⁸⁹ and
- give another opportunity to the respondent to provide a payment schedule to the claimant within 5 business days⁴⁹⁰ after receiving the claimant's notice ('second chance payment schedule').⁴⁹¹

If the respondent again fails to provide a payment schedule, it will be disallowed from lodging an adjudication response.⁴⁹² This effectively means that a respondent will not then have an opportunity to be heard by an adjudicator, who is essentially limited to a consideration of the submissions duly made by the parties⁴⁹³ when determining the adjudication.⁴⁹⁴

Even in circumstances where the respondent duly serves a payment schedule, it may only include in any subsequent adjudication response reasons for withholding payment which have previously been included in the payment schedule.⁴⁹⁵ Thus, a respondent may be prevented from being able to present its full case to the adjudicator unless it has previously

⁴⁸⁵ NSW Act, ss 15(2)(b). The claimant's right to suspend work under the contract are set out in s 27 of the NSW Act, which is discussed further in Chapter 6.6 below.

⁴⁸⁶ NSW Act, ss 15(2)(a)(i) and 15(4).

⁴⁸⁷ NSW Act, ss 15(2)(ii) and 17(1)(b).

⁴⁸⁸ The Victorian Act differs from the other East Coast Acts in that it only allows 10 business days – see Victorian Act, s 18(2)(a).

⁴⁸⁹ NSW Act, s 17(2)(a).

⁴⁹⁰ The Victorian Act differs from the other East Coast Acts in that it only allows 2 business days – see Victorian Act, s 18(2)(b).

⁴⁹¹ NSW Act, s 12(2)(b).

⁴⁹² NSW Act, s 20(2A).

⁴⁹³ Ie, payment claim, payment schedule and all submissions that have been duly made in their support.

⁴⁹⁴ NSW Act, s 22(2).

⁴⁹⁵ NSW Act, s 20(2B).

served a comprehensive payment schedule which covers all the issues it may wish to rely on subsequently. The Victorian Act, however, differs from the other East Coast model Acts in this respect by way of a 2007 amendment,⁴⁹⁶ which provides that:⁴⁹⁷

If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant-

- (a) setting out those reasons; and
- (b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

The NSW Act is unique among the East Coast model Acts in that it provides for a claimant to require a ‘principal contractor’ (ie, the party who engaged, and is responsible for paying, the respondent⁴⁹⁸) to retain sufficient money to cover the amount of the payment claim which is the subject of the adjudication application.⁴⁹⁹ The effect of this is similar to a charging order, freezing the disputed moneys in the hands of the principal contractor and thereby preventing the use of the disputed moneys by the respondent. In order to do this, a claimant, who has made an adjudication application, must serve a ‘payment withholding request’ on the principal contractor which includes a statutory declaration that the claimant genuinely believes that the amount of money claimed is owed by the respondent to the claimant.⁵⁰⁰ If necessary, the adjudicator may, at the request of the claimant, direct the respondent to provide information to the claimant as to the identity and contact details of the principal contractor.⁵⁰¹ The principal contractor is only obligated to retain moneys out of any payment it owes to the respondent.⁵⁰² If the principal contractor has already paid all the money it owes to the respondent before receiving the payment

⁴⁹⁶ Effected by way of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic).

⁴⁹⁷ Victorian Act, s 21(2B).

⁴⁹⁸ NSW Act, s 26A(4) defines a principal contractor as ‘a person by whom money is or becomes payable to the respondent for work carried out or materials supplied by the respondent to the person as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.’

⁴⁹⁹ In accordance with s 26A of the NSW Act, added by the *Building and Construction Industry Security of Payment Amendment Act 2010* (NSW) which commenced on 28 Feb 2011.

⁵⁰⁰ NSW Act, ss 26A(2) and 26A(3).

⁵⁰¹ NSW Act, s 26E.

⁵⁰² NSW Act, s 26B(2).

withholding request, it must notify the claimant of that within 10 business days after receiving the request.⁵⁰³ Assuming money is due from the principal contractor to the respondent, the principal contractor is obligated to retain money until one of the following events occurs:⁵⁰⁴

- (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,
- (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 of the adjudication application is served on the principal contractor.

A principal contractor who pays the respondent in contravention of its obligation pursuant to a payment withholding request becomes jointly and severally liable with the respondent in respect of the debt owed by the respondent to the claimant.⁵⁰⁵

Unlike the East Coast model, the West Coast model provides no separate, parallel detailed statutory payment system, but rather gives primacy to the parties' agreed contractual payment regime where one exists.⁵⁰⁶ As such, where the recipient of a payment claim fails to pay the amount certified under the contract by the due date, unlike the East Coast model, the claimant has no statutory right to summary judgment. In such circumstances, therefore, a claimant wishing to apply for summary judgment under the West Coast model must do so at common law. In contrast to the statutory right to seek summary judgment provided by the East Coast model, enforcement of summary judgments at common law may be thwarted if a defendant can demonstrate to the court that it can mount a reasonable defence by way of a cross claim (see Chapter 4.3.5 above), in which case the only option left to the contractor will be to pursue its claim in relatively lengthy and costly court or arbitration proceedings.

⁵⁰³ NSW Act, s 26A(5).

⁵⁰⁴ NSW Act, s 26B(3).

⁵⁰⁵ NSW Act, s 26C(1).

⁵⁰⁶ If no such payment regime is provided for in the construction contract, then the payment provisions set out in a schedule to the legislation are implied into the contract.

The West Coast model default payment provisions regarding payment procedure, which are implied into construction contracts that lack such provisions, prescribe the form and content of payment claims⁵⁰⁷ and notices of dispute (which are to be given by a party who rejects or disputes the whole or part of a payment claim it has received under the contract).⁵⁰⁸ They stipulate that:

- notices of dispute are to be given to the claimant within 14 days after receiving the claim;⁵⁰⁹ and
- undisputed, or undisputed parts of, payment claims must be paid within 28 days after a party receives a payment claim.⁵¹⁰

The West Coast model default provisions do not provide the right for a contractor to suspend construction work in the event that the principal does not pay the whole claim (if undisputed), or any undisputed portion of the claim, by the due date for payment.

The WA Act⁵¹¹ provides that a party to the contract must apply to have a payment dispute adjudicated within 28 days after the dispute about payment arises.⁵¹² Although the NT Act originally also provided 28 days, it was amended⁵¹³ in 2007 to extend the period to 90 days.⁵¹⁴

Under the West Coast model, a dispute arises if ‘by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed.’⁵¹⁵ The judiciary in WA and NT, however, have interpreted this provision differently. In WA, the WA State Administrative Tribunal has construed the provision as meaning that a dispute arises as soon as a payment

⁵⁰⁷ WA Act, s 16 and Schedule 1 Division 4.

⁵⁰⁸ WA Act, s 17 and Schedule 1 Division 5.

⁵⁰⁹ WA Act, s 17 and Schedule 1 Division 5, s 7(1)(b).

⁵¹⁰ WA Act, s 17 and Schedule 1 Division 5, s 7(3).

⁵¹¹ WA Act, s 26(1).

⁵¹² See *DPD Pty Ltd v McHenry* [2012] WASC 140.

⁵¹³ By way of the *Justice Legislation Amendment Act (no 2) 2007*, s 4.

⁵¹⁴ NT Act, s 28(1).

⁵¹⁵ WA Act, s 6(a); NT Act, s 8(a).

claim is rejected even if it is rejected before the time for payment of the claim is due.⁵¹⁶ In NT, the Supreme Court has construed the provision as meaning that no dispute can arise until the payment claim would be due for payment.⁵¹⁷ Thus, according to the NT interpretation, there can be no valid adjudication application until the due date for payment of the payment claim has arrived.

Within 14 days after the date on which a party is served with an adjudication application, the party must prepare a written response to the application and serve it on the applicant and appointed adjudicator.⁵¹⁸

Unlike the East Coast model, the West Coast model does not make the serving of a response to the payment claim, stating reasons for withholding payment,⁵¹⁹ a condition precedent to the right of a party who is served with an adjudication application⁵²⁰ to lodge an adjudication response. Additionally, unlike the East Coast model, there are no limitations as to the inclusion of reasons for withholding payment in a response to an adjudication application. Thus, providing that a party lodges their response to an adjudication application within the time allowed by the legislation,⁵²¹ it will not be deprived of the opportunity to present its full case to the appointed adjudicator.

6.6 Adjudicator Appointment

Under the East Coast model, the adjudication application must be made to an Authorised Nominating Authority (ANA) chosen by the claimant.⁵²² An ANA is a person has been authorised in accordance with the Act to nominate adjudicators for the purposes of the Act. Under all the East Coast model Acts, with the exception of the Queensland Act,

⁵¹⁶ See *Blackadder v Mirvac* [2009] WASAT133; *Fuel Tank v Decmil* [2010] WASAT165; *South Coast Scaffolding v Hire Access* [2012] WASAT5.

⁵¹⁷ *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd* [2012] NTSC 22.

⁵¹⁸ WA Act, s 27(1).

⁵¹⁹ Ie, the equivalent of a “payment schedule” in East Coast terminology - although under the West Coast legislation a response to a payment claim is a contractual rather than a statutory requirement.

⁵²⁰ Ie, the equivalent of the “respondent” in East Coast terminology.

⁵²¹ Within 14 days (WA Act, s 27(1)) or 10 working days (NT Act, s 29(1)) after the date on which a party to a construction contract is served with an application for adjudication.

⁵²² See s 17(3)(b) of the NSW Act.

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ANAs are authorised by a prescribed authority.⁵²³ ANAs must provide the prescribed authority with any information it requests in relation to the activities of the ANA under the Act.⁵²⁴ The Queensland Act requires persons to apply to the Adjudication Registrar (the registrar)⁵²⁵ for registration as an ANA,⁵²⁶ and sets down detailed application criteria for registration.⁵²⁷ Registration will only be granted if the registrar is satisfied the applicant is a suitable person to be registered as an ANA.⁵²⁸

As shown in Table 6.2, the ANAs currently operating in the East Coast jurisdictions comprise a mixture of legal professional bodies or associations,⁵²⁹ construction professional bodies or associations,⁵³⁰ and private for-profit companies.⁵³¹

Table 6.2 – Number and Types of ANAs in the East Coast model Jurisdictions

Type of ANA	NSW	Victoria	Queensland	Tasmania	ACT	SA
Legal Professional Body or Association	2	2	3	1	1	1
Construction Professional Body or Association	4	1	2	1	1	0
Private ‘for profit’ company	3	4	3	2	3	3
Total	9	7	8	4	5	4

Each ANA maintains its own panel of adjudicators. When the ANA receives an adjudication application from a claimant, it refers the application to one of its adjudicators.

⁵²³ Under the NSW Act, s 28(1), SA Act, s 29(1), and ACT Act, s 31(1), it is the Minister who may authorise ANAs. Under the Victorian Act, s 42(1), it is the Building Commission. Under the Tasmanian Act, s 31(2), it is the Security of Payments Official.

⁵²⁴ NSW Act, s 28(5).

⁵²⁵ The Queensland Act, ss36, 37, provide for the establishment of an Adjudication Registry and appointment of an Adjudication Registrar.

⁵²⁶ Queensland Act, s 42(1).

⁵²⁷ Queensland Act, s 43.

⁵²⁸ Queensland Act, s 45.

⁵²⁹ Such as the Institute of Arbitrators and Mediators Australia, and LEADR (formerly known as Lawyers Engaged in Alternative Dispute Resolution).

⁵³⁰ Such as the Master Builders Association, and the Royal Institution of Chartered Surveyors Dispute Resolution Service.

⁵³¹ Such as Able Adjudication Pty Ltd, Adjudicate Today Pty Ltd, and Australian Solutions Centre Pty Ltd.

The adjudicator may accept the application by causing notice of the acceptance to be served on the claimant and the respondent, in which case the adjudicator is taken to have been appointed to determine the application.⁵³²

Under all the East Coast model Acts, with the exception of the Queensland Act, a person is eligible to be an adjudicator if the person is a natural person, and has the qualifications, expertise and experience required for the purposes of the Act.⁵³³ Of these Acts, however, none, except the SA Act,⁵³⁴ appear to set out the required qualifications, expertise and experience either in the Act itself or the associated regulations. In practice, therefore, it is left to the ANAs to ensure that adjudicators are suitably qualified, trained and experienced.

The Queensland Act is unique amongst the East Coast model Acts in requiring that an adjudicator must be registered as an adjudicator under the Act.⁵³⁵ In order to be registered, a person must hold an adjudication qualification as prescribed in the regulations made under the Act.⁵³⁶ In this respect, the *Building and Construction Industry Payments Regulation 2004* (the ‘Queensland Regulations’) states⁵³⁷ that the name of the qualification is ‘Certificate in Adjudication’, and lists the elements that need to be successfully completed in the certificate to become a registered adjudicator,⁵³⁸ as well as listing the names of the bodies who may issue such a qualification.⁵³⁹ The registrar must keep a register containing details of ANAs and adjudicators,⁵⁴⁰ available for inspection by an

⁵³² NSW Act, s 19.

⁵³³ The NSW Act, s 18(1)(b) and SA Act, s 18(1)(b) state that such qualifications, expertise and experience may be prescribed by the regulations for the purposes of this Act. The Tasmanian Act, s 22(2), states that the qualifications, expertise and experience required, if any, are to be determined by the Security of Payments Official. The ACT Act, s 20(1)(c), further requires that an adjudicator must have successfully completed a relevant training course.

⁵³⁴ The Building and Construction Industry Security of Payment Regulations 2011 (SA), s 6 requires that a person has attended a 2 day adjudication course, and either holds a degree, diploma or other qualification in a listed discipline or is, or is eligible to be, a member of a listed professional body.

⁵³⁵ Queensland Act, s 22(1).

⁵³⁶ Queensland Act, s 111(2)(b).

⁵³⁷ Queensland Regulations, s 3.

⁵³⁸ Queensland Regulations, Schedule 1, Part 2.

⁵³⁹ Queensland Regulations, Schedule 1, Part 1. The bodies listed comprise 7 out of the 8 registered ANAs.

⁵⁴⁰ Queensland Act, s 38(2)(a).

entity without charge (unless otherwise prescribed by a regulation).⁵⁴¹ Additionally, the registrar must keep records of decisions by adjudicators and publish the decisions.⁵⁴²

Under the East Coast legislation, an ANA may charge a fee for any service it provides in connection with an adjudication application made to it. The ANA's fee may be capped at an amount determined by the Minister.⁵⁴³

An adjudicator is also entitled to be paid fees and expenses for adjudicating an application.⁵⁴⁴ The amount to be paid is as agreed between the adjudicator and the parties to the adjudication.⁵⁴⁵ In practice the adjudicator's fee is usually set, and advertised, by the relevant ANA on behalf of their adjudicator. There is no provision for the Minister to cap adjudicators' fees as there is with ANAs' fees. ANAs typically take a commission, as agreed between the ANA and its adjudicator, from adjudicators' fees.

The claimant and respondent are jointly and severally liable to pay both the ANA's fee⁵⁴⁶ and the adjudicator's fee.⁵⁴⁷ Both ANAs and adjudicators are immune from liability for anything done, or omitted to be done, in good faith in exercising (or in the reasonable belief that they were exercising) their functions under the Act.⁵⁴⁸

Unlike the East Coast model,⁵⁴⁹ under the West Coast model the parties to the adjudication have the option to either agree on an individual adjudicator,⁵⁵⁰ or on a prescribed

⁵⁴¹ Queensland Act, s 38(2)(b).

⁵⁴² Queensland Act, s 38(2)(d). The decisions are available on the Queensland Building and Construction Industry Payments Agency website at <http://www.bcipa.qld.gov.au/DecisionSearch/Pages/DecisionSearch.aspx>

⁵⁴³ NSW Act, s 28(3).

⁵⁴⁴ NSW Act, s 29(1).

⁵⁴⁵ NSW Act, s 29(1)(a).

⁵⁴⁶ NSW Act, s 28(4).

⁵⁴⁷ NSW Act, s 29(2).

⁵⁴⁸ NSW Act, s 30(1).

⁵⁴⁹ Although the original NSW Act did allow for the parties to agree an adjudicator or ANA, the Act was amended in 2003 to remove these possibilities due to the short timeframe available for the claimant to make the adjudication application, and the procedures followed by claimants to date in selecting adjudicators unilaterally (NSW Department of Public Works and Services 2002: 28).

⁵⁵⁰ WA Act, s 26(1)(c)(i).

appointor⁵⁵¹ to select an adjudicator for them.⁵⁵² If neither an adjudicator nor a prescribed appointor is appointed by the parties, the party applying for adjudication may serve their application on a prescribed appointor of their choice.⁵⁵³

If an adjudication application is served on a prescribed appointor, the appointor must within 5 days select an adjudicator, send the adjudication application and any response received by it to the adjudicator, and notify the parties and the Building Commissioner (WA Act) or registrar (NT Act)⁵⁵⁴ in writing accordingly.⁵⁵⁵ If a prescribed appointor does not make an appointment, the Building Commissioner or registrar may appoint a registered adjudicator to adjudicate the payment dispute concerned.⁵⁵⁶

There are eight prescribed appointors listed in both the WA and NT regulations, comprising a mixture of construction professional bodies or associations and legal professional bodies or associations. No private ‘for-profit’ prescribed appointors exist under the West Coast model Acts.

Similar to the Queensland legislation, but unlike the other East Coast model Acts, adjudicators must be registered under the West Coast model. An individual is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations.⁵⁵⁷ The regulations state that, to be eligible, an individual must:⁵⁵⁸

- i) have a degree in law, project management or a construction-related discipline,⁵⁵⁹ be eligible for membership of a listed professional institution,⁵⁶⁰ or, be a builder registered under the Builders’ Registration Act 1939;

⁵⁵¹ According to the WA Act, s 3, prescribed appointor means a person prescribed as such by the regulations.

⁵⁵² WA Act, s 26(1)(c)(ii).

⁵⁵³ WA Act, s 26(1)(c)(iii).

⁵⁵⁴ The NT Act, s 49, provides for the establishment of an office called the Construction Contracts Registrar, and the appointment of a Registrar by the Minister.

⁵⁵⁵ WA Act, s 28(1).

⁵⁵⁶ WA Act, s 28(2).

⁵⁵⁷ WA Act, s 48(1); *Construction Contracts Regulations 2004* (WA), Reg 9.

⁵⁵⁸ *Construction Contracts Regulations 2004* (WA), Reg 9.

⁵⁵⁹ Architecture, engineering, quantity surveying, building surveying, building or construction.

- ii) have had at least 5 years experience in administering construction contracts, or in dispute resolution relating to construction contracts; and
- iii) have successfully completed an appropriate training course which qualifies the person for the performance of the functions of an adjudicator under the Act.

Both registered adjudicators and prescribed appointors may charge for their work under the Act at rates which may not exceed any maximum rate prescribed by the Regulations.⁵⁶¹ As with the East Coast model, the parties to an adjudication are jointly and severally liable to pay the adjudication costs.⁵⁶² Adjudicators, prescribed appointors and the registrar are all immune from tortious liability for anything they have done in good faith in the performance or purported performance of a function under the Act.⁵⁶³

The Building Commissioner or registrar must keep a register of registered adjudicators and make it available for public inspection at no charge.⁵⁶⁴ The Building Commissioner or registrar may make available for public inspection the result, or a report, of the decisions of registered adjudicators.⁵⁶⁵ But, the Building Commissioner or registrar must not identify the parties to an adjudication or reveal any part of a determination which the adjudicator has deemed not suitable for publication because of its confidential nature.⁵⁶⁶

6.7 Adjudicators' Determinations and their Enforcement

In practice, there is little difference in the time allowed for an adjudicator to make his or her determination between the East Coast and West Coast models. The East Coast model requires determination within 10 business days, although the East Coast Acts are divided with respect to when the 10 business days start to run. Under the NSW and Victorian Acts

⁵⁶⁰ 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.

⁵⁶¹ WA Act, s 44(2)(a)(i). Although the WA and NT Regulations do not currently prescribe any such maximum rates.

⁵⁶² WA Act, s 44(5).

⁵⁶³ WA Act, s 54.

⁵⁶⁴ WA Act, s 48(6).

⁵⁶⁵ WA Act, s 50(1).

⁵⁶⁶ WA Act, s 50(2).

they start to run after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application.⁵⁶⁷ Under the other East Coast Acts, the 10 business days run from after the date on which the adjudicator receives the adjudication response.⁵⁶⁸ With respect to the West Coast model, the WA Act requires determination within 14 days⁵⁶⁹ and the NT Act within 10 working days,⁵⁷⁰ after the date of the service of the response to the adjudication application. Under both the East and West Coast models, the prescribed time for determination may be extended with the consent of the parties.⁵⁷¹

With respect to adjudication proceedings, both the East and West Coast models provide that an adjudicator may:

- request further written submissions from either party, and set deadlines for doing so,⁵⁷²
- call a conference of the parties,⁵⁷³ and
- carry out an inspection of any matter to which the claim (East Coast model), or payment dispute (West Coast model), relates.⁵⁷⁴

The West Coast model further provides that an adjudicator may arrange for any thing to which the payment dispute relates to be tested,⁵⁷⁵ provided the owner of the thing consents to the testing, and/or engage an expert to investigate and report on any matter relevant to the payment dispute.⁵⁷⁶

⁵⁶⁷ NSW Act, s 21(3)(a); Victorian Act, s 22(4)(a).

⁵⁶⁸ Qld Act, s 25(3)(a); Tasmanian Act, s 24(1)(a); SA Act, s 21 (3)(a); ACT Act, s 23(3)(a).

⁵⁶⁹ WA Act, s 31(1). The WA Act does not define 'day'. However, s 61(1)(e) of the *Interpretation Act 1984* (WA) states that where the time limited for the doing of a thing expires or falls upon a Saturday, Sunday or public holiday, the thing may be done on the next day that is not an excluded day.

⁵⁷⁰ NT Act, s 33(3).

⁵⁷¹ NSW Act, s21(3)(b); WA Act, s 32(3)(a).

⁵⁷² NSW Act, ss 21(4)(a) and 21(4)(b); WA Act, s 32(2)(a).

⁵⁷³ NSW Act, s 21(4)(c); WA Act, s 32(2)(b).

⁵⁷⁴ NSW Act, s 21(4)(d); WA Act, s 32(2)(c)(i).

⁵⁷⁵ WA Act, s 32(2)(c)(ii).

⁵⁷⁶ WA Act, s 32(2)(c)(iii).

If the adjudicator requests any further written submissions from either party, then the East Coast model states that the adjudicator must give the other party an opportunity to comment on those submissions.⁵⁷⁷

If any conferences are called by the adjudicator, under the East Coast model the parties are not entitled to any legal representation.⁵⁷⁸ The West Coast model does not contain any similar restriction on legal representation.

Under the East Coast model, the adjudicator is to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ‘adjudicated amount’), the date on which any such amount became or becomes payable, and the rate of interest payable on it.⁵⁷⁹ The adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.⁵⁸⁰ If determination of an adjudication application involves the valuation of any construction works (or related goods and services) under the contract which have been the subject of a previous adjudication application, the adjudicator is to give them the same value as that previously determined, unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous determination.⁵⁸¹

Under the West Coast model, the adjudicator must determine, on the balance of probabilities, whether any party to the payment dispute is liable to make a payment and, if so, determine the amount to be paid, any interest upon it, and the date on or before which it is to be paid.⁵⁸²

Under the East Coast model, in determining an adjudication application the adjudicator is limited to a consideration of the following matters only:⁵⁸³

- (a) the provisions of this Act,

⁵⁷⁷ NSW Act, s 21(4)(a).

⁵⁷⁸ NSW Act, s 21(4A).

⁵⁷⁹ NSW Act, s 22(1).

⁵⁸⁰ NSW Act, s 21(1).

⁵⁸¹ NSW Act, s 22(4).

⁵⁸² WA Act, s 31(2)(b).

⁵⁸³ NSW Act, s 22(2).

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- (b) the provisions of the construction contract from which the application arose,
- (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
- (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

An adjudicator under the West Coast legislation is not as restricted as his or her East Coast counterpart when making their determination. Rather, similar to several major Australian tribunals,⁵⁸⁴ the West Coast model provides that an adjudicator ‘is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.’⁵⁸⁵ This has the effect of extending the adjudicator’s investigative powers beyond the consideration of the parties’ submissions, thus assisting the adjudicator in ascertaining and/or developing the facts and the law relevant to the determination of the payment claim. Although Evans (2005: 14) notes:

there will be situations where the rules of evidence will apply. For example where a written contract purports to contain all of the terms of a contract, the parole evidence rule will prevent extrinsic evidence being led to contradict or vary the written terms of the contract.

Also, informing oneself in any way one thinks fit is also subject to the rules of natural justice ... guidance may be obtained from a consideration of the provisions of the Commercial Arbitration Act. Section 19 of the Act contains a similar provision ... the courts have consistently held that where an arbitrator takes into account matters, that have not been raised by the parties, in determining the award, it is incumbent on the arbitrator to refer those matters to the parties for comment before handing down the award.

⁵⁸⁴ For example, see the *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(c); *Migration Act 1958* (Cth) ss 353(2)(a), 359(1).

⁵⁸⁵ WA Act, s 32(1)(b) and NT Act, s34(1)(b). Note that the NT Act substitutes the word “appropriate” for “fit” in this provision.

The West Coast model expressly states that an adjudicator must dismiss an adjudication application within the prescribed time for determination, without making a determination of its merits, if:⁵⁸⁶

- (i) the contract concerned is not a construction contract;
- (ii) the application has not been prepared and served in accordance with section 26;
- (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or
- (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;

Under both the East and West Coast models, the adjudicator's determination must be in writing, and include the reasons for the determination.⁵⁸⁷ Additionally, both models allow for the adjudicator, either on their own initiative or on application of either party, to correct clerical errors, arithmetical errors, or accidental slips or omissions in their determination.⁵⁸⁸

The East Coast model requires that a respondent pay any adjudicated amount stated in the determination on or before the relevant date, which is five business days after the date on which the adjudicator's determination is served on the respondent, unless the adjudicator determines a later date.⁵⁸⁹ The West Coast model states that 'a party that is liable to pay an amount under a determination must do so on or before the date specified in the determination.'⁵⁹⁰

The West Coast model expressly states that progress payments (but not final payments) under adjudicators' determinations are to be on account, or are 'to be taken to be an advance towards the total amount payable under the contract by the principal to the contractor.'⁵⁹¹ Whilst the East Coast model does not expressly state as much, adjudicated

⁵⁸⁶ WA Act, s 31(2)(a).

⁵⁸⁷ NSW Act, s 22(3); WA Act, ss 36(a) and 36(d).

⁵⁸⁸ NSW Act, s 22(5); WA Act, s 41(2).

⁵⁸⁹ NSW Act, s 23.

⁵⁹⁰ WA Act, s 39(1).

⁵⁹¹ WA Act, s 40.

progress payments are also treated as being on account of the final payment (Davenport 2010a: 4).

The East Coast model provides that nothing done with respect to the recovery of progress payments under the Act affects any civil proceedings arising under a construction contract.⁵⁹² The West Coast Act provides that nothing done in relation to adjudication of disputes under the Act shall prevent a party to a construction contract from initiating proceedings before a court or tribunal in relation to any matter arising under a construction contract.⁵⁹³ The West Coast model further states that, 'Evidence of anything said or done in an adjudication is not admissible before an arbitrator ... or a court.'⁵⁹⁴

Under both models, therefore, adjudication 'can be commenced before or in parallel with litigation or arbitration' (Davenport 2010a: 4). An adjudicator's determination is binding on the parties to the construction contract in the interim, up until the time a court judgment or arbitration award is made concerning the matter arising under the construction contract.⁵⁹⁵ As Davenport (2010a: 4) states:

The common law doctrines of res judicata and issue estoppel do not prevent arbitration or litigation of issues which have been the subject of adjudication. However, once the claimant has been paid the amount in issue (albeit on account), it will be for the respondent to try to recover it. The claimant will then have the advantages which the respondent traditionally had in litigation or arbitration.

If, subsequent to the adjudicator's determination, neither party initiates court or arbitration proceedings, the adjudicator's determination will remain binding. Thus, where adjudications determine the final payment claim on a construction contract,⁵⁹⁶ and neither

⁵⁹² NSW Act, s 32(2). The only exception is in relation to any adjustments a court or arbitrator makes in its award to account for an adjudicator's determination.

⁵⁹³ WA Act, s 45(1).

⁵⁹⁴ WA Act, s 45(3). The only exception is where a party makes an application to the State Administrative Tribunal for either the disqualification of the adjudicator due to conflict of interest, or for review of the adjudicator's decision to dismiss an adjudication application.

⁵⁹⁵ WA Act, s 38 states that 'an adjudicator's determination is binding on the parties to the construction contract ... even though other proceedings relating to the payment dispute have been commenced before an arbitrator or other person or a court or other body.'

⁵⁹⁶ According to Davenport (2010a: 4), the majority of East Coast adjudications are over the final payment under a contract, and in the majority of cases, after the adjudication, neither party takes the dispute any further.

party subsequently initiates litigation or arbitration in relation to the claim, the adjudicator's determination will effectively resolve the matter.

Where, however, matters under the construction contract are taken to litigation or arbitration, both the East and West Coast models provide that, in making any award or judgment, a court or tribunal:

- must allow for any amount paid to a party to the contract under a determination of a payment dispute in adjudication,⁵⁹⁷ and
- may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate.⁵⁹⁸

Under the East Coast model, where a respondent fails to pay the whole or any part of the adjudicated amount to the claimant, the claimant may request the ANA to whom the adjudication application was made to provide an adjudication certificate.⁵⁹⁹ Further, the claimant 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.⁶⁰⁰ The claimant may then file the adjudication certificate as a judgment debt in any court of competent jurisdiction and it is enforceable accordingly.⁶⁰¹ The adjudication certificate must be accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.⁶⁰² If the respondent commences proceedings to have the judgment set aside, the Act provides anti-suit provisions which disallow a respondent in those proceedings to bring any cross-claim against the claimant, raise any defence in relation to matters arising under the construction contract, or challenge the adjudicator's determination.⁶⁰³ Further, the respondent is required to pay into the court as security the

⁵⁹⁷ NSW Act, s 32(3)(a); WA Act, s 45(4)(a).

⁵⁹⁸ NSW Act, s 32(3)(b); WA Act, s 45(4)(b).

⁵⁹⁹ NSW Act, s 24(1)(a). In practice, ANAs charge an administrative fee for the provision of an adjudication certificate.

⁶⁰⁰ NSW Act, s 24(1)(b).

⁶⁰¹ NSW Act, s 25(1).

⁶⁰² NSW Act, s 25(2).

⁶⁰³ NSW Act, s 25(4)(a).

unpaid portion of the adjudicated amount pending the final determination of those proceedings.⁶⁰⁴

Similar to the East Coast model, the West Coast model provides the right for a contractor to give the principal notice of the contractor's intention to suspend the performance of its contractual obligations where the principal has not complied with the adjudicator's determination.⁶⁰⁵ Where a party does not comply with an adjudicator's determination, the West Coast model also allows the other party, with the leave of a court of competent jurisdiction, to enforce the adjudicator's determination (which must be signed by the adjudicator and certified by the Building Commissioner as having been made by a registered adjudicator) in the same manner as a judgment or order of the court.⁶⁰⁶ The West Coast model, however, does not preclude a defendant to such proceedings from bringing a cross-claim or raising a defence under the contract. Neither does the West Coast model require the defendant to provide any security.

The East Coast model allows a claimant to suspend works under the contract if at least two business days have passed since the claimant has given notice of intention to do so,⁶⁰⁷ and the right to suspend exists for a period of three business days immediately following the date on which the claimant receives payment of the outstanding amount.⁶⁰⁸ The West Coast model requires that such notice be given at least three days before the date of intended suspension, and the right to suspend exists until no longer than three days after the date on which the amount is paid.⁶⁰⁹ Under both models, a claimant (contractor or supplier) who suspends its contractual obligations in accordance with the Act is not liable for any loss or damage suffered by the respondent (principal) as a consequence of the claimant not carrying out its contractual obligations during the period of suspension.⁶¹⁰ The East Coast model further provides that a respondent is liable to pay any loss or expenses incurred by the claimant, in exercising its right to suspend works under the Act,

⁶⁰⁴ NSW Act, s 25(4)(b).

⁶⁰⁵ WA Act, s 42.

⁶⁰⁶ WA Act, s 43.

⁶⁰⁷ NSW Act, s 27(1).

⁶⁰⁸ NSW Act, s 27(2).

⁶⁰⁹ WA Act, s 42(3).

⁶¹⁰ NSW Act, s 27(3). WA Act, s 42(5)(a).

as a result of the removal by the respondent from the contract of any part of the work or supply.⁶¹¹

6.8 Statutory Rights to Appeal Adjudicators' Determinations

As Speranza (2011: 172) states, 'New South Wales, South Australia and Tasmania do not expressly provide statutory avenues of appeal within their Acts. However, the remaining East Coast jurisdictions do.'

The Queensland Act's review process starts with an internal review. A party may apply for an internal review to the registrar⁶¹² within 28 days after the day it became aware of the adjudicator's decision.⁶¹³ A review applicant may also apply for a stay of the decision, until the registrar makes its review decision, to the Queensland Civil and Administrative Tribunal (QCAT).⁶¹⁴ If the party who applied for internal review of the adjudicator's decision is dissatisfied with the review decision, it may apply to the QCAT for an external review of the internal review decision.⁶¹⁵

The Victorian Act provides limited rights for review of adjudicators' determinations which exceed \$100,000.⁶¹⁶ A respondent is only allowed to apply for an adjudication review on the ground that the adjudicated amount included an excluded amount,⁶¹⁷ and the respondent identified that amount as an excluded amount in its payment schedule or adjudication response.⁶¹⁸ Additionally, the respondent must pay the alleged excluded amounts into a designated trust account.⁶¹⁹ A claimant may only apply for an adjudication review on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an

⁶¹¹ NSW Act, s 27(2A).

⁶¹² Queensland Act, s 93.

⁶¹³ Queensland Act, s 94(1).

⁶¹⁴ Queensland Act, s 96(1).

⁶¹⁵ Queensland Act, s 97.

⁶¹⁶ Victorian Act, s 28A.

⁶¹⁷ Victorian Act, s 28B(3).

⁶¹⁸ Victorian Act, s 28B(4).

⁶¹⁹ Victorian Act, s 28B(6).

excluded amount.⁶²⁰ Adjudication review applications must be made to the ANA to which the adjudication application was made.⁶²¹ The ANA must then appoint a review adjudicator,⁶²² who must not have been involved with the original adjudication determination,⁶²³ to conduct the review.

Under the ACT Act, an appeal may be made to the Supreme Court on any question of law arising out of an adjudication decision.⁶²⁴ Either party to the adjudication decision may bring an appeal with the leave of the Supreme Court, or with the consent of the parties to the decision.⁶²⁵ The Supreme Court may only grant leave where the determination of the question of law concerned could substantially affect the rights of one or more parties to the decision, and there is either: a manifest error of law on the face of the adjudication decision; or strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law.⁶²⁶

The West Coast model only permits review of an adjudicator's decision to dismiss the application without making a determination of its merits (as discussed in Chapter 6.7).⁶²⁷ A person may apply for such a review to the State Administrative Tribunal (SAT) under the WA Act,⁶²⁸ or the Local Court under the NT Act.⁶²⁹ In WA, the Supreme Court has recently held that the right of review by the SAT under the Act is limited to a decision to dismiss an adjudication application, and cannot be extended to review the determination of an adjudicator who has decided not to dismiss an application and made a determination on the merits.⁶³⁰ It is possible for the decisions which the SAT (in WA) and Local Court (in NT) make under their statutory power to review to be, in turn, reviewed in the appropriate

⁶²⁰ Victorian Act, s 28C(2).

⁶²¹ Victorian Act, s 28D(1).

⁶²² Victorian Act, s 28G(1).

⁶²³ Victorian Act, s 28G(3).

⁶²⁴ ACT Act, s 43(2).

⁶²⁵ ACT Act, s 43(3).

⁶²⁶ ACT Act, s 43(4).

⁶²⁷ WA Act, s 46(1).

⁶²⁸ WA Act, s 46(1).

⁶²⁹ NT Act, s 48(1).

⁶³⁰ *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217.

court.⁶³¹ Appeals or reviews of adjudicators' decisions or determinations on any other grounds are expressly disallowed.⁶³²

As discussed further in Chapters 3.11, 7.6.2 and 7.6.3, in addition to the express avenues of appeal in the Acts, judicial review of an adjudicator's determination may also be available under either the inherent jurisdiction of superior courts derived from the common law or, in some jurisdictions, separate judicial review legislation.⁶³³

6.9 No Contracting Out

Both the East and West Coast models render void any contractual provisions which purport to exclude, modify or restrict the operation of the legislation.⁶³⁴ Further to this:

- the East Coast model provides that any contractual provision that may reasonably be construed as an attempt to deter a person from taking action under this Act is void;⁶³⁵ and
- the West Coast model provides that any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under the Act has no effect.⁶³⁶

There have been several court judgments in NSW which have considered the operation of the 'no contracting out' provision.⁶³⁷ This is due to the East Coast model providing a separate statutory payment system that interacts with contractual payment provisions (as

⁶³¹ For decisions of the SAT, an appeal lies to the Court of Appeal where the Tribunal's decision was made by a judicial member or a judicial member was included on the Tribunal or, in any other case, to the Supreme Court – see *State Administrative Tribunal Act 2004* (WA), s 105(3). For orders of the NT Local Court, appeals lie to the Supreme Court – see *Local Court Act* (NT), s 19.

⁶³² WA Act, s 46(3).

⁶³³ The ACT, Queensland, Tasmania and Victoria have such legislation. However, as discussed further in Chapter 7.6.2, Queensland has excluded adjudicators' decisions under the Queensland Act from the scope of its *Judicial Review Act 1991*.

⁶³⁴ NSW Act, s 34(2)(a); WA Act, s 53(1).

⁶³⁵ NSW Act, s 34(2)(b).

⁶³⁶ WA Act, s 53(3).

⁶³⁷ See, for example, *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823; *John Goss Projects v Leighton Contractors Pty Ltd & Davenport* [2006] NSWSC 798; *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140.

discussed in Chapter 6.5) for its operation, thereby creating the possibility that contractual provisions may be inconsistent with the intent of the statutory payment system. The full scope of the provision to interfere with contractual terms is not yet known, and is developing on a case-by-case basis.⁶³⁸ To date, it would appear that the contracting out provision may apply to invalidate contractual provisions which prescribe conditions precedent and/or conditions subsequent which:

- cause excessive delay to the claimant's right to receive progress payments for variation works to the contract;⁶³⁹ or
- have the practical effect of either barring or limiting the contents of payment claims due to being unreasonable in nature, for example by setting a very short timeline for the submission of a detailed claim.⁶⁴⁰

Furthermore, in *Minister for Commerce v Contrax Plumbing*,⁶⁴¹ Hodgson J viewed that a contractual provision regarding determination of reference dates, or the calculation of the amount of progress payments, could be deemed as restricting the operation of the NSW Act if such provision was sufficiently inimical to the object of the Act that a claimant is entitled to receive a progress payment.

⁶³⁸ For further discussion, see generally McDougall (2006).

⁶³⁹ *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823.

⁶⁴⁰ *John Goss Projects v Leighton Contractors Pty Ltd & Davenport* [2006] NSWSC 798 at [83].

⁶⁴¹ [2004] NSWCA 142 at [53] & [54].

6.10 A Comparative Overview of the Australian and International Legislation

As mentioned at the beginning of this chapter, security of payment legislation similar to the Australian Acts also exists in the UK, NZ, and Singapore. Generally, the UK Act is more similar in structure and provision to the Australian ‘West Coast’ Acts,⁶⁴² and the Singapore Act to the Australian ‘East Coast’ Acts. The NZ Act, however, falls in between the two Australian models, containing an East Coast style statutory payment system which is nested within a statutory framework which allows for adjudication of all disputes under a construction contract. The key characteristics of all the Australian and international security of payment legislation are summarised in Table 6.3.

The key differences between the Australian legislative models and each of the international Acts are discussed further below.

The UK Act

With respect to all the core provisions listed in Chapter 6.1 above, the UK Act is more similar in nature to the Australian West Coast model.

Both the UK and West Coast model Acts provide a set of default payment procedure provisions to be implied where the parties fail to provide an adequate payment mechanism under the construction contract. These default payment provisions are set out in a schedule at the back of the West Coast Acts, whereas for the UK Act they are set out in *The Scheme for Construction Contracts (England and Wales) Regulations 1998*.

There are, however, some significant differences between the UK and West Coast model Acts:

- (i) The UK Act does not apply to contracts with residential occupiers (or home owners), nor to contracts which are solely for the supply of goods related to

⁶⁴² The similarities between the UK and West Coast model Acts have led Davenport (2010: 36) to describe the East Coast model as the ‘Australian model’ and the West Coast model as the ‘UK model’.

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Table 6.3 – Key Characteristics of the Australian and International Security of Payment Acts

Key Characteristic	<i>Australian East Coast model Acts</i>	<i>Australian West Coast model Acts</i>	<i>UK Acts</i>	<i>NZ Act</i>	<i>Singapore Act</i>
<i>Scope of Disputes Covered</i>					
Applies to contracts for supply of goods related to construction work.	Yes	Yes	No	No	Yes
Applies to contracts for professional services related to construction work.	Yes	Yes	Yes	No	Yes
Applies to oral contracts as well as written contracts.	Yes	Yes	Yes	Yes	No
Types of disputes covered.	Payment claims for construction work done (or goods & services supplied)	Payment claims under the contract	Any differences under the contract	Any differences under the contract	Payment claims for construction work done (or goods & services supplied)
Excludes construction contracts with 'residential occupiers'.	Yes (except for the Tasmanian Act)	No	Yes	No (but certain statutory provisions do not apply)	Yes (but exclusion limited to contracts for insignificant building works)
<i>Payment Systems</i>					
Enforces contractual progress payment mechanism. Default payment provisions implied into construction contracts which fail to provide adequate contractual payment provisions.	No	Yes (default provisions in Schedule at the back of the Act)	Yes (default provisions in Regulations)	No	No
Separate statutory payment procedure for making payment claims and responding to payment claims running alongside contractual payment system.	Yes (highly detailed and regulatory)	No	No	Yes (less detailed and regulatory than ECM Acts)	Yes (highly detailed and regulatory)
Statutory consequences of principal failing to duly respond to a payment claim and pay full amount of claim.	Claimant may: suspend contract works, and either: - recover claim as debt in court, or - apply for adjudication in which respondent will not be allowed to submit an adjudication response	Claimant may apply for adjudication	Claimant may suspend works under the contract, and apply for adjudication	Claimant may suspend works under the contract, and recover claim as debt in court	Claimant may apply for adjudication in which respondent will not be allowed to submit an adjudication response
<i>Adjudication Schemes</i>					
Allows parties to establish detail of a contractual adjudication process in lieu of the statutory adjudication scheme.	No	No	Yes	No	No
Who can apply for adjudication under the Act.	Payee Only (contractor or supplier)	Either contractual party	Either contractual party	Either contractual party	Payee Only (contractor or supplier)
Respondent to an adjudication application prevented from raising reasons for withholding payment in an adjudication response which were not previously included in a duly served response to the progress payment claim.	Yes	No	No	No	Yes
Encourages adjudicator to adopt investigative approach to ascertaining relevant facts and law when making his or her determination.	No	Yes	Yes	No	No
Time for adjudicator to make his or her determination.	10 business days	14 days	28 days	20 working days	14 days

construction work. However, goods which are supplied under a contract which also provides for their installation are covered.⁶⁴³

- (ii) The UK Act allows a party to a construction contract the right to refer not just payment claims for adjudication, but any difference arising under the contract.
- (iii) The form of the UK Act prescribes the detail which the parties must include in certain of the contractual payment provisions in order to avoid the implication of the default provisions. This is particularly evident with respect to the detailed contractual requirements regarding payment structure.⁶⁴⁴
- (iv) The UK Act provides a right for a payee to suspend performance of its obligations under the contract where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given.⁶⁴⁵
- (v) The UK Act allows the parties to agree the details of their own adjudication scheme in their construction contract, subject to the inclusion of certain key provisions listed in the legislation.⁶⁴⁶ If the contract does not comply with these requirements, the default adjudication provisions contained in the *Scheme for Construction Contracts Regulations* apply.⁶⁴⁷
- (vi) The UK Act allows the adjudicator at least 28 days to reach his or her decision from the date on which the dispute was referred to the adjudicator, which is around double the time allowed by both Australian models.
- (vii) Whilst the wording of the Australian West Coast model encourages the adjudicator to take an investigative role in determining a dispute, the wording of UK Act is more

⁶⁴³ UK Act, s 105(2)(d).

⁶⁴⁴ See, for example, see ss 110 and 110A of the UK Act, as amended by the *Local Democracy, Economic Development and Construction Act 2009*, s 143.

⁶⁴⁵ UK Act, s 112.

⁶⁴⁶ See UK Act, s 108(1) to (4).

⁶⁴⁷ UK Act, s 108(5).

emphatic in this respect, stating that the construction contract shall ‘enable the adjudicator to take the initiative in ascertaining the facts and the law.’⁶⁴⁸

- (viii) The UK Act does not provide any assistance for a party seeking the enforcement of an adjudicator’s decision.⁶⁴⁹ In practice, an adjudicator’s decision will usually be enforced through the courts by issuing legal proceedings and making an immediate application for summary judgment.
- (ix) Although provisional in nature, the UK Act encourages the parties to use statutory adjudication as a means to finally resolve their dispute. The UK Act states that, ‘The parties may agree to accept the decision of the adjudicator as finally determining the dispute.’⁶⁵⁰ As such, Bowsher J states that, ‘Proceedings before an adjudicator are not legal proceedings. They are a process designed to avoid the need for legal proceedings.’⁶⁵¹

It is perhaps due to this last point that Britton (2009: 4) observes:

For most UK construction contracts, the arrival of statutory adjudication has relegated litigation and arbitration into second and third place as methods of dispute resolution: in practice, few disputes, once provisionally resolved via an adjudicator’s decision, are later reopened, save at most to the limited extent possible in enforcement proceedings.

Indeed, Fenwick Elliott (2006: 46) observes that for the first few years after the UK legislation commenced, there was a significant growth in the number of adjudications, accompanied by a corresponding fall in the amount of construction litigation and arbitrations. Davenport (2007: 13)⁶⁵² and Shnookal (2009: 16) report the decrease in building litigation since the UK Act was introduced to be in the order of 80%. However, as Gaitskell (2005: 8) points out, this reduction may also be attributed to the introduction

⁶⁴⁸ UK Act, s 108(2)(f).

⁶⁴⁹ Section 23(1) of the original *Scheme for Construction Contracts (England and Wales) Regulations 1998* gave the adjudicator the power to order any of the parties to comply peremptorily with his or her decision. However, this was rarely used and was omitted from the *Scheme* in 2011 in England by way of *The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011*.

⁶⁵⁰ UK Act, s 108(3).

⁶⁵¹ *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] EWHC Technology 434 at [19].

⁶⁵² Citing Gaitskell (2005).

of the *Civil Procedure Rules 1998* in the UK court system and the growth in the mediation of building disputes.

The NZ Act

Like the UK Act, the NZ Act allows referral of any dispute or difference under the construction contract for adjudication.⁶⁵³ This includes disputes about both payment claims⁶⁵⁴ and non-payment claims regarding the rights and obligations of the parties under the construction contract.⁶⁵⁵

The NZ Act covers construction contracts with residential occupiers, although the application of certain sections of the Act (default provisions for progress payments, the right to suspend works for non-payment of an amount due, and the right to the issue of a charging order in respect of a construction site) are excepted from such contracts.⁶⁵⁶ In catering for residential occupiers, the NZ Act requires that payment claims served on residential occupiers be accompanied by an outline of the process for responding to that claim, and an explanation of the consequences of not responding to a payment claim and not paying the claimed or scheduled amount in full.⁶⁵⁷

The NZ Act does not cover contracts for professional services related to construction work or contracts which are solely for the supply of goods related to construction work, unless they are contracts for the prefabrication of customised components of any building or structure either on or off-site.⁶⁵⁸

With respect to progress payment provisions, the NZ Act resembles the Australian East Coast model Acts in that it sets out a separate statutory payment system which the payee

⁶⁵³ NZ Act, s 25(1).

⁶⁵⁴ Section 25(2), states ‘An example of a dispute is a disagreement between the parties to a construction contract about whether or not an amount is payable under the contract (for example, a progress payment) or the reasons given for non-payment of that amount.’

⁶⁵⁵ NZ Act, ss 48(1)(b) and 48(2). Section 58(2) states that an adjudicator’s determination about the parties’ rights and obligations under the construction contract is not enforceable. According to s 61(1), however, a party may bring proceedings in any court to enforce its rights under the contract which an adjudicator has determined.

⁶⁵⁶ NZ Act, s 10.

⁶⁵⁷ NZ Act, s 20(3).

⁶⁵⁸ NZ Act, s 6(1)(f)(iv).

(claimant) may engage by stating that the payment claim is being made under the Act.⁶⁵⁹ Like the East Coast model, the NZ Act provides that a payer (respondent) may respond to a payment claim under the Act by providing a payment schedule indicating a scheduled amount with reasons given if the scheduled amount is less than the claimed amount.⁶⁶⁰ Similarly, if a payer (respondent) fails to provide a payment schedule in the stipulated timeframe,⁶⁶¹ or fails to pay the scheduled amount by the due date for payment, the payee (claimant) becomes entitled to recover the outstanding claimed or scheduled amount as a debt in any court,⁶⁶² and to suspend carrying out of its construction work under the contract.⁶⁶³ In any such court proceedings, the payer (respondent) will not be entitled to raise any counterclaim, set-off, or cross-demand other than a set-off of a liquidated amount.⁶⁶⁴ The main New Zealand standard forms of general conditions of contract (NZS and NZIA) have been amended to reflect the payment procedure provisions of the Act, so that the contractual progress payment scheme in each case mirrors the Act.

Unlike the Australian East Coast model, the NZ Act does not allow a respondent a second chance to provide a payment schedule. On the other hand, a respondent (payer) is not barred from lodging an adjudication response, or from raising any reasons for withholding payment in its adjudication response, as a consequence of not satisfying the payment schedule provisions. Furthermore, contrary to the Australian East Coast model, the NZ Act does not make engagement of the statutory payment system a precondition to the right of a claimant (payee) to refer a dispute for adjudication.⁶⁶⁵ Therefore, a claimant may apply for adjudication of a progress payment claim made under the contract, even where it has not endorsed the claim on its face as being made under the Act. However, such failure to endorse its payment claim would mean that the claimant would not have the right under the Act to recover the amount of its claim as a debt in court. These differences in the NZ Act's adjudication scheme may be explained by the fact that the NZ Act provides a

⁶⁵⁹ NZ Act, s 20(2)(f).

⁶⁶⁰ NZ Act, s 21.

⁶⁶¹ Either the time agreed in the construction contract or, if the contract does not provide for the matter, 20 working days after the payment claim is served – NZ Act, s 22(b)(ii).

⁶⁶² NZ Act, ss 23 and 24.

⁶⁶³ NZ Act, ss 23(2)(b) and 24(2)(b).

⁶⁶⁴ NZ Act, s 79.

⁶⁶⁵ NZ Act, ss 25(1) and 25(2).

common adjudication scheme for the resolution of progress payment disputes and all other disputes under the contract, whereas the Australian East Coast model's adjudication scheme caters for progress payment disputes only.

With respect to adjudicator appointment, the NZ Act is similar to the WA and UK Acts in that it allows the parties to contractually agree either an individual adjudicator or nominating body. However, the NZ Act has a unique provision which states that such an agreement is not binding if it was made by the parties before the dispute arose between them.⁶⁶⁶ This prevents a party with dominant bargaining power from being able to unfairly influence the identity of the adjudicator prior to the dispute occurring.

Similar to the Australian East Coast model, the NZ Act limits an adjudicator to a consideration of certain matters in determining an adjudication application.⁶⁶⁷ The NZ Act, however, allows the adjudicator a longer period of 20 working days to determine an adjudication application, which starts to run from the end of the period which the respondent has to lodge an adjudication response.⁶⁶⁸

Under the NZ Act, a party who wants to oppose an application to the court for the enforcement of an adjudicator's determination can only oppose such an application on the grounds that: the adjudicated amount has been paid in full, the adjudicator's determination related to a contract which was not a construction contract under the Act, or a condition imposed in the adjudicator's determination has not been met.⁶⁶⁹

The NZ Act contains a unique provision for the court to enforce the issuing of a charging order in respect of a construction site where an adjudicator's determination records approval for such.⁶⁷⁰ However, in order for an adjudicator to be able to approve the issuing of a charging order, the claimant must seek such approval from the adjudicator when initiating adjudication.⁶⁷¹

⁶⁶⁶ NZ Act, s 33(3).

⁶⁶⁷ NZ Act, s 45.

⁶⁶⁸ NZ Act, s 46(2)(a).

⁶⁶⁹ NZ Act, s 74(2).

⁶⁷⁰ NZ Act, s 76.

⁶⁷¹ NZ Act, s 29.

The Singapore Act

The Singapore Act, being closely modelled on the NSW Act,⁶⁷² resembles the Australian East Coast model Acts in providing for a dual payment system, progress payment claims by contractors or suppliers only, and limited powers of investigation for adjudicators. There are, however, some differences between the Singapore and Australian East Coast model worth noting.

Rather than excluding all contracts with residential occupiers, the Singapore Act excludes contracts for building works with residential occupiers which do not require the approval of the Commissioner of Building Control under the *Building Control Act*.⁶⁷³ This effectively limits the exclusion to insignificant building works.⁶⁷⁴

The Singapore Act allows the parties two representatives (legally qualified or otherwise) at conferences called by an adjudicator.⁶⁷⁵

Under the Singapore Act, the 14 day time period in which an adjudicator has to determine an adjudication application starts to run from the end of the period which the respondent has to lodge an adjudication response.⁶⁷⁶

The Singapore Act uniquely shortens the time in which the adjudicator must make their determination to 7 days in circumstances where a respondent has either failed to make a payment response⁶⁷⁷ and to lodge an adjudication response by the commencement of the adjudication, or has failed to pay the response amount.⁶⁷⁸ This shorter timescale is presumably justified in such circumstances by the fact that, respectively, the adjudicator will either be not permitted to consider reasons in a respondent's adjudication response,⁶⁷⁹

⁶⁷² See Chan (2006: 248).

⁶⁷³ Singapore Act, s 4(2)(a).

⁶⁷⁴ As listed in the First Schedule to the *Building Control Regulations 2003*.

⁶⁷⁵ Singapore Act, s 16(5).

⁶⁷⁶ Singapore Act, s 17(1)(b).

⁶⁷⁷ Ie, the equivalent of a payment schedule under the Australian East Coast model Acts.

⁶⁷⁸ Singapore Act, s 17(1)(a).

⁶⁷⁹ In accordance with Singapore Act, s 15(3).

or there will be no dispute as to the payment response amount to be paid which has been accepted by the claimant.

6.11 Freedom of Contract

The requirement for construction contracts to include specific provisions with respect to payment and adjudication and the implication of default payment provisions to ‘plug any gaps’ in the contractual payment mechanism mean that security of payment legislation inevitably interferes to some degree with the parties’ freedom of contract.

Shortly after the introduction of the UK Act, when considering Parliament’s policy for the purposes of legislative interpretation, Judge Humphrey Lloyd (2001: 448) commented:

It is hard to think of another comparable case of Parliament singling out parts of a sector of the commercial life of the country and requiring them to alter their contracts ... on the basis that it knew better than its members how their commercial relationships should be regulated. It is a remarkable interference in the freedom of contract enjoyed by people who are normally well able to look after themselves.

Because the legislation adopts a ‘one-size fits all’ approach rather than targeting those lower tiers of the contracting chain, where traditional independent contractual payment certification mechanisms are not commonly provided, it has the potential to interfere with construction contracts of all sizes. Accordingly, Duncan Wallace (1999: 21) has criticised the UK Act for its application to construction contracts between principals and main contractors at the top of the hierarchical contracting chain. However, despite this criticism, the potential for the UK Act to interfere with freely agreed contractual terms is lesser at the top of the contractual hierarchical chain where construction contracts, often standard forms, are used which typically provide payment provisions of the type required by the Act.

Potential for the Australian East Coast model Acts to interfere with freedom of contract is significantly greater than the UK Act by dint of their provision of a separate regulatory statutory payment system running alongside the contractual payment scheme (see Chapter

6.5), combined with their ‘no contracting out’ provision (see Chapter 6.9).⁶⁸⁰ By providing for an independent payment determination process, the separate statutory payment system undermines the traditional independent contractual payment certification process by the contract administrator provided for in the vast majority of standard forms of construction contracts. As Justice McDougall (2006) states:

s.34 [ie, the ‘no contracting out’ provision in the NSW Act] will operate in all circumstances where contractual clauses attempt to eradicate or limit the rights given under the Act. As a result, the section is likely to alter the effect of numerous contractual provisions.

It has been suggested by Zhang (2009: 396) that the rationale behind the East Coast model’s highly regulatory method of protecting contractors stems from ‘distrust of the integrity of the respondent in the contract negotiation stages.’

It may be said, indeed, that the highly regulatory nature of the Australian East Coast model is akin to that usually found in legislation enacted to protect vulnerable individual consumers and employees. This is at odds with the traditionally cautious approach of the judiciary and legislature

about interfering with parties’ ability to enter into agreements as “the construction industry is an area where consistency of approach in regard to standard form contracts and the application of the Act are the most important”. (Zhang 2009: 392)⁶⁸¹

Indeed, there are several examples of judgments in recent times where the courts have conspicuously refrained from interfering with freedom of contract in construction cases, even extending to the circumstances where a contractual term may appear, at first sight, to be harsh.⁶⁸² In *Ringrow Pty Ltd v BP Australia Pty Ltd*,⁶⁸³ the High Court of Australia stated:

⁶⁸⁰ See, for example, NSW Act, s 34.

⁶⁸¹ Citing *Transgrid v Siemens Ltd* [2004] NSWSC 87 at [24].

⁶⁸² See, for example, *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2)* [2007] EWHC 447 (TCC); *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; *State of Tasmania v Leighton Contractors Pty Ltd* [2005] TASSC 133.

⁶⁸³ (2005) 224 CLR 656 at [31] and [32].

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The law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships ... Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed.

Whilst the Australian West Coast model imposes statutory adjudication upon the entire contracting chain, like the UK Act it otherwise generally ‘supports the privity [sic, primacy?] of contract between the parties’ (MacTiernan 2004: 275) with respect to payment provisions.⁶⁸⁴ As stated by Ms MacTiernan (2004: 275) in her Second Reading speech for the *WA Construction Contracts Bill*:

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 ...

... the Bill does not unduly restrict the normal commercial operation of the industry. Parties to a construction contract remain free to strike whatever bargains they wish between themselves, as long as they put the payment provisions in writing and do not include the prohibited terms.

⁶⁸⁴ Although the West Coast legislation is not totally without regulation on the contractual payment system. For example, s10 of the WA Act prevents the period between payment claim and payment from being any longer than 50 days.

Chapter 7

The Performance of Statutory Adjudication in Australia – A Comparative Review

7.1 Review Criteria

In Chapter 2.8, four interrelated key criteria were identified by which dispute resolution systems can be evaluated. These criteria were efficiency, satisfaction (which incorporates the notion of procedural justice), effect on relationship, and stability of outcome. Using these criteria, this chapter will attempt to evaluate the East and West Coast statutory adjudication schemes by considering some of the existing available data sources with respect to their performance since commencement, as well as the procedural requirements of the legislation.

Initially in this chapter, published usage data is reviewed in order to ascertain the extent and nature of use of statutory adjudication in the East and West Coast jurisdictions. Next, in an attempt to gauge their operational efficiency, the direct and indirect costs of the schemes are discussed. As an indicator of user satisfaction, the ‘fairness’ afforded by the East and West Coast model payment procedures is considered. The effect of the schemes on the disputing parties’ relationship is also considered. Finally, as a measure of stability of outcome, the amount of litigation resulting from adjudication determinations is considered.

7.2 Usage Data

Usage of statutory adjudication in Australia is monitored by the relevant administering government bodies in each jurisdiction.⁶⁸⁵ Most of these government bodies have collated, to varying degrees of detail, statistical adjudication usage data. In the East Coast model jurisdictions, the data is provided by the ANAs, who must provide the Minister with such information as may be requested in relation to the activities of the authority under the

⁶⁸⁵ NSW Procurement Division, Department of Services, Technology and Administration; Building Commission Victoria; Building and Construction Industry Payments Agency (Qld); Building Management & Works Division, Department of Treasury and Finance (WA); Department of Justice (NT); Planning & Land Authority, Environment & Sustainable Development Directorate (ACT); Building Control, Department of Justice (Tas); Consumer & Business Services (SA).

Act.⁶⁸⁶ In the West Coast model jurisdictions, the data is provided by the adjudicators when, as they must, they give a copy of their decision to the to the relevant Government bodies.⁶⁸⁷

The relevant government bodies in Queensland and WA have collated by far the most comprehensive adjudication data out of all the Australian jurisdictions over the past few years, and have made this data publicly available via their websites. Adjudication data collated by the relevant NSW and NT government bodies has been significantly more limited in scope than that published in Queensland and WA. Up until 2009, NSW Procurement used to publish on its website data regarding numbers of adjudication applications and total value of amounts claimed in adjudication. Whilst this data is no longer available, as from the first quarter of 2011/12 NSW Procurement has started again to publish, this time, more comprehensive data on its website.⁶⁸⁸ Data from NT is available upon request. Due to the recent commencement of their legislation, adjudication data collated by the relevant ACT, Tasmanian and SA government bodies is limited and, as yet, is not publicly available. As such, comparative data from the relevant Queensland and WA government bodies has primarily been presented in this chapter, although the limited available data from the NSW, Victorian and NT government bodies is also discussed.

Whilst it would be imprudent to draw any conclusions as to the success of any particular statutory adjudication model based on the usage data *per se*, the data does act as a useful descriptor as to the nature of the construction industry's adoption of statutory adjudication.

Figure 7.1 shows the number of adjudication applications lodged per annum in the five jurisdictions of NSW, Queensland, Victoria, WA, and NT since commencement of the legislation. The table shows that there has been a significant use of statutory adjudication in NSW and Queensland since commencement of the legislation. In contrast, however, statutory adjudication under the Victorian Act has been used very little. The reason for this relatively low use in Victoria is not clear, although it has been suggested by Shnookal (2009: 13) that the complicated limiting provisions unique to the Victorian Act (as

⁶⁸⁶ NSW Act, s 28(5).

⁶⁸⁷ WA Act, s 36(g); NT Act, s 38(2).

⁶⁸⁸ Available at: <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Construction/Security-of-Payment/Adjudication-Activity-Statistics.aspx>

discussed in Chapter 6.5) are to blame as they erode the effectiveness of statutory adjudication as an ADR process. As he explains:

What can or should be put into the adjudication application informs the assessment of whether the adjudication process is useful in a particular case or not. For example, a significant dispute about whether or not work of very significant cost is or is not a change in the scope of the work under the contract is not something that can be adjudicated under the Victorian Act. Similarly, a claim is [sic] for an “excluded amount” can not be pursued in the adjudication ... the point is that in deciding whether or not to commence the adjudication process at all, consideration has to be given to whether or not the substantial claims made can actually be decided by the Adjudicator.

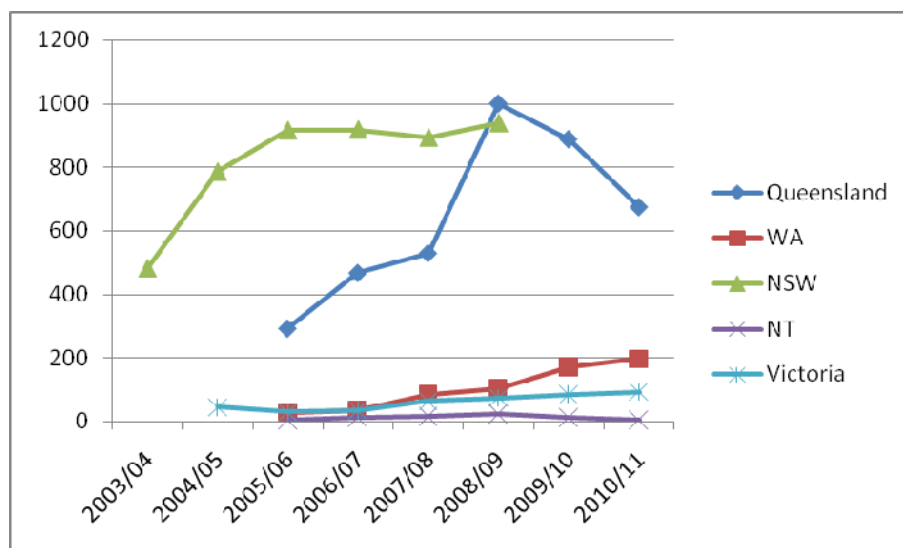


Figure 7.1 – Number of Adjudication Applications per Year⁶⁸⁹

* NSW and NT numbers are per calendar year, whereas WA, Victoria and Queensland numbers are per financial year.

** The NSW numbers are only shown up until 2008, after which there was a hiatus in publication of the relevant data by NSW Procurement on their website. Since recommencement of publication, as from the first quarter of 2011/12, the adjudication data shows 842 adjudication applications lodged between 1 July and 31 Mar 2012.⁶⁹⁰

***The Victorian number for 2004/05 is the number of applications from the commencement of the Act on 31 Jan 2003 to 30 June 2005.

⁶⁸⁹ NSW data obtained upon request from NSW Procurement; Victorian data sourced from the Victorian Building Commission (2012); Queensland data sourced from the Queensland Building and Construction Industry Payments Agency (2010; 2011); WA data sourced from the WA Construction Contracts Registrar (2011); NT data obtained upon request from the NT Department of Justice.

⁶⁹⁰ Source: NSW Procurement (2012).

It can be seen from Figure 7.1 that the number of adjudication applications in NSW and Queensland grew rapidly in the 2 to 3 years after commencement of the legislation.⁶⁹¹ The number of adjudication applications peaked at 999 in Queensland in 2008/09, and at 940 in NSW in 2008. However, in the following 2 years there has been quite a sharp decline in the number of applications in Queensland, with 887 applications in 2009/10, and 674 applications in 2010/11. Such a decline, however, does not appear to have occurred in NSW, with 842 applications having been lodged in the first 9 months of 2011/12.⁶⁹² The value of construction work done in Queensland decreased by 1% between 2008/09 and 2009/10, but then increased by 8% between 2009/10 and 2010/11. Therefore, the recent decline in numbers of adjudication applications is unlikely to be due to changes in construction activity, and represents an opportunity for further research.

In WA there has been a steady increase in the number of adjudication applications since 2005/06. However, the actual number of adjudication applications in WA is still significantly less than in Queensland, with 105 applications in 2008/9, 172 applications in 2009/10 and 197 applications in 2010/11. This represents a 64% increase in adjudication applications between 2008/9 and 2009/10, and a 15% increase in adjudication applications between 2009/10 and 2010/11. This far exceeds the increase in the value of construction work done in WA over the same periods, being 4% between 2008/9 and 2009/10 and 7% between 2009/10 and 2010/11. In the NT, there were 5 adjudication applications in 2006, 12 applications in 2007, 16 applications in 2008, 24 applications in 2009, 12 applications in 2010, and 4 applications in 2011.⁶⁹³

In order to compare this adjudication usage data on a more equal footing, Table 7.1 shows the number of adjudications and total value of payment claims with respect to the size of each jurisdiction's construction industry. It can be seen that there was approximately one adjudication application for every \$59.8 million of construction work carried out in Queensland in 2010/11, and one adjudication application for every \$40.3 million of

⁶⁹¹ In the case of NSW, after commencement of the amendments to the legislation in March 2003.

⁶⁹² Source: NSW Procurement (2012).

⁶⁹³ Source: NT Department of Justice. Data obtained upon request.

construction work carried out in NSW for the first two quarters of 2011/12.⁶⁹⁴ This compares to approximately one adjudication for every \$190.2 of construction work carried out in 2010/11 in WA, and one adjudication for every \$159.1 million of construction work carried out in 2010/11 in NT. Thus, even when adjusting for size of construction industry, it can be seen that statutory adjudication is being used far more frequently in Queensland and NSW than in WA and NT.

In Victoria, there was approximately one adjudication application for every \$380.5 million of construction work carried out in 2010/11, which appears anomalous when compared to the other East Coast jurisdictions of NSW and Queensland. The Victorian statistic is explained by the relatively low usage of adjudication, as discussed above, that has occurred there.

Table 7.1 – Adjudication Applications and Payment Claims as proportion of Construction Work Done

Jurisdiction	Year	No. Of Adjudication Applications ⁶⁹⁵	Total Value of Payment Claims ⁶⁹⁶ '000	Value of Construction Work Done at Current Prices ⁶⁹⁷ '000	Value of Construction Work Done/ No. Of Adjudication Applications '000	Total Value of Payment Claims as a percentage of Value of Construction Work Done
NSW	Q1&Q2, 2011/12	492	\$138,230	\$19,836,471	\$40,318	0.70%
Victoria	2010/11	93	\$24,153	\$35,387,854	\$380,515	0.07%
Queensland	2010/11	674	\$174,563	\$40,329,291	\$59,836	0.43%
WA	2010/11	197	\$308,554	\$37,473,249	\$190,220	0.82%
NT	2010	12	\$3,025	\$1,909,113	\$159,093	0.16%

Table 7.1 also shows that in 2010/11, the total value of payment claims as a percentage of value of construction work done was 0.82% in WA which is almost double that in

⁶⁹⁴ This figure has only been calculated for the first two quarters of 2011/12 in NSW due to the relevant construction activity data only being available up until Dec 2011 from the Australian Bureau of Statistics (2011).

⁶⁹⁵ NSW data sourced from NSW Procurement (2012); Victorian data sourced from the Victorian Building Commission (2012); Queensland data sourced from the QBCIPA (2010; 2011); WA data sourced from the WA Construction Contracts Registrar (2011); NT data sourced upon request from the NT Department of Justice.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ Source: Australian Bureau of Statistics (2011).

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Queensland over the same period. The total value of value of payment claims as a percentage of value of construction work done was 0.70% in NSW for the first two quarters of 2011/12. This reflects the fact that, as shown in Table 7.2, the mean amount claimed in adjudication in Queensland for 2010/11 was approximately \$259,000 and in NSW for the first two quarters of 2011/12 was approximately \$281,000, which is only 16.5% and 17.9% respectively of the mean claim amount in WA, which was approximately \$1,566,000.

Table 7.2: Mean Amounts Claimed in Adjudication Application

	NSW ⁶⁹⁸	Victoria ⁶⁹⁹	Queensland ⁷⁰⁰	WA ⁷⁰¹	NT ^{702*}
2008/9	N/A	\$620,690	\$234,800	\$341,324	
2009	N/A				\$670,614
2009/10	N/A	\$351,372	\$252,493	\$1,356,198	
2010	N/A				\$281,859
2010/11	N/A	\$259,708	\$258,996	\$ 1,566,262	
2011	N/A				\$133,743
Q1&Q2, 2011/12	\$280,956				

* Note that the data for NT is reported by calendar year as opposed to financial year.

The data presented in Table 7.3 shows that 50% of all payment claims adjudicated in Queensland for 2010/11, and 44% in NSW for the first three quarters of 2011/12, were for less than \$25,000. Whereas in WA for 2010/11, only 19% of all adjudicated payment claims lodged were for less than \$25,000. Furthermore, 37% of all payment claims adjudicated in WA for 2010/11 were in excess of \$250,000, whereas only 14% of all payment claims adjudicated in Queensland for 2010/11, and 14% in NSW for the first three quarters of 2011/12, were in excess of \$250,000.

⁶⁹⁸ Source: NSW Procurement (2012).

⁶⁹⁹ Calculated from data published by the Victorian Building Commission (2012).

⁷⁰⁰ Source: QBCIPA (2009; 2010; 2011).

⁷⁰¹ Source: WA Construction Contracts Registrar (2011).

⁷⁰² Calculated from data obtained upon request from the NT Department of Justice.

Although around half of all adjudicated applications in NSW and Queensland concern smaller payment claims (for less than \$25,000), adjudication is still being used to determine a significant proportion of larger payment claims. Of the 42 adjudicated applications for payment claims above \$500,000 in Queensland in 2010/11, the average payment claim amount was approximately \$3.7 million.⁷⁰³ The largest amount determined in adjudication in Queensland, to date (decision released on 1 August 2011), is in the amount of approximately \$86.8 million.⁷⁰⁴ In NSW, there have been 22 adjudication determinations with respect to payment claims in excess of \$1 million during the first three quarters of 2011/12.⁷⁰⁵ The average amount claimed in these 22 applications was approximately \$3.2 million. The other Australian jurisdictions could not be considered in this analysis as their relevant government departments have not published the necessary data.

Thus, a far higher proportion (more than double) of the adjudications occurring under the East Coast model schemes in NSW and Queensland concern small payment claims (less than \$25,000) than under the West Coast model scheme in WA. Further, a far higher proportion (again more than double) of the adjudications occurring under the West Coast model scheme in WA concern large payment claims (more than \$250,000) than in NSW and Queensland.

⁷⁰³ QBCIPA (2011).

⁷⁰⁴ This determination was subsequently set aside in *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 29, as discussed in Chapter 7.6.2.

⁷⁰⁵ NSW Procurement (2012).

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Table 7.3 – Number of Adjudications by Claim Value in Queensland, WA and NSW

Range of Claims	Queensland ⁷⁰⁶		Western Australia ⁷⁰⁷		NSW ⁷⁰⁸	
	2010/11		2010/11		Q1-Q3, 2011/12	
	Number of Payment Claims Decided by Adjudicator*	Percentage of Total Adjudication Decisions	Number of Payment Claims Decided by Adjudicator *	Percentage of Total Adjudication Decisions	Number of Payment Claims Decided by Adjudicator*	Percentage of Total Adjudication Decisions
\$0-\$9,999	157	30%	22	14%	130	24%
\$10,000-\$24,999	103	20%	9	5%	111	20%
\$25,000-\$99,999	132	25%	44	27%	152	28%
\$100,000-\$249,999	56	11%	28	17%	76	14%
\$250,000-\$499,999	29	6%	19	12%	30	6%
>\$500,000	42	8%	40	25%	45	8%
Total	519	100%	162	100%	544	100%

* The difference between the number of adjudications decided by the adjudicator and the number of adjudication applications shown in Figure 7.1 is accounted for by some of the applications being withdrawn, some applications pending determination, and some determinations being given from applications made in the previous year. Note that the number of payment claims adjudicated in WA includes 57 which the adjudicator decided to dismiss under s 31(2) of the WA Act.

7.3 Operational Efficiency

The operational efficiency of statutory adjudication is a significant factor in its adoption by the construction industry. Direct costs of adjudication include the adjudication fee paid to the ANA and adjudicator, as well as the resources (time and money) invested by the disputing parties preparing for and participating in the adjudication process. Additionally, a statutory adjudication scheme will have consequential costs which arise due to any administrative burden generated in the construction industry's day-to-day business operations as a result of having to comply with the requirements of the statutory

⁷⁰⁶ QBCIPA (2011).

⁷⁰⁷ Calculated from WA Construction Contracts Registrar (2011).

⁷⁰⁸ NSW Procurement (2012).

adjudication scheme. As such, the efficiency of each of the East and West Coast statutory adjudication schemes is considered with respect to adjudication fees, and the duration and administrative requirements of the adjudication processes.

7.3.1 Adjudication Fees

Table 7.4 shows the mean adjudication fees for various ranges of payment claim sizes in Queensland and WA for 2010/2011, and in NSW for the first three quarters of 2011/12. Adjudication fee data for the other jurisdictions is not available and, therefore, cannot be considered here.

Table 7.4 – Mean Adjudication Fees Reported in Queensland, WA and NSW

Range of Claims	Mean fees for Adjudication		
	Queensland ⁷⁰⁹ 2010/11	WA ⁷¹⁰ 2010/11	NSW ⁷¹¹ Q1-Q3, 2011/12
\$0-\$9,999	\$873	\$1634	\$725
\$10,000-\$24,999	\$2062	\$3,880	\$1,249
\$25,000-\$99,999	\$3,553	\$3,225	\$2,636
\$100,000-\$249,999	\$6,887	\$3,876	\$5,445
\$250,000-\$499,999	\$10,307	\$4,761	\$8,353
>\$500,000	\$16,907	\$7,466	\$15,356

It may be seen that mean adjudication fees are 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

⁷⁰⁹ QBCIPA (2011).

⁷¹⁰ Construction Contracts Registrar (WA) (2011).

⁷¹¹ NSW Procurement (2012).

For payment claims between \$25,000 and \$99,999, the mean adjudication fee in WA is 91% of that in Queensland. However, for the same payment claim range, the mean fee in NSW is only 82% of that in WA.

For all larger payment claims, above \$100,000, mean adjudication fees are lower in WA than Queensland and NSW. For payment claims between \$100,000 and \$249,999 the mean adjudication fee in WA is 56% of that in Queensland, and 71% of that in NSW. For payment claims over \$250,000, the mean adjudication fee in Queensland is generally more than double, and in NSW around double, of that in WA. It may also be seen that, generally, for payment claims exceeding \$100,000, the larger the payment claim is, the lower the adjudication fee is in WA relative to Queensland and NSW.

7.3.2 Duration of Adjudications

Practically, there is little difference in the time allowed for an adjudicator to make his or her determination between the East Coast and West Coast models. The East Coast model requires determination within 10 business days,⁷¹² whereas the WA Act requires determination within 14 days.⁷¹³ There is a difference, however, in timing with respect to the period which a respondent has to serve a response to the adjudication application.

Under the East Coast model a respondent has to lodge its adjudication response within 5 business days after receiving the claimant's adjudication application or 2 business days after receiving notice of the adjudicator's acceptance of the adjudication application, whichever is the later.⁷¹⁴ Thus, assuming an adjudication response is lodged 5 business days after the adjudication application is received by the respondent and the adjudicator notifies their acceptance of the application in a timely fashion,⁷¹⁵ the whole adjudication

⁷¹² See NSW Act, s 21(3); and Victoria Act, s 22(4).

⁷¹³ See s 31(1) of the WA Act. The WA Act does not define 'day'. However, s 61(1)(e) of the *Interpretation Act* (WA) 1984 states that where the time limited for the doing of a thing expires or falls upon a Saturday, Sunday or public holiday, the thing may be done on the next day that is not an excluded day.

⁷¹⁴ See s 20(1) of the NSW Act.

⁷¹⁵ Under s 21(3) of the NSW Act, the start of the adjudication termination period is triggered by the adjudicator's notice of acceptance. In practice this may mean that the determination period may commence before the adjudication response has been lodged. However, the adjudication determination period is triggered by the serving of the adjudication response under the Queensland, SA, Tasmanian, ACT, WA and NT Acts.

process from application to determination (presuming the adjudicator takes the full 10 business days to make their determination) takes 15 business days (or 3 weeks).

The West Coast model allows the respondent 14 days⁷¹⁶ from the date on which the adjudication application was served to prepare and serve its adjudication response. Thus, assuming an adjudication response is lodged by the respondent 14 days after the serving of the adjudication application, the whole adjudication process from application to determination (presuming the adjudicator takes the full 14 days to make their determination) takes 28 days (or 4 weeks).

Under the East Coast model's payment system, as described above, if the respondent takes the full 10 business days⁷¹⁷ permitted after the payment claim is served to lodge a payment schedule, the soonest which an adjudication application can be lodged is on the 11th business day after the payment claim is served. Thus, the minimum period of time from payment claim to adjudication determination will be approximately 5 weeks. In the case where a respondent fails to serve a payment schedule and is given a second chance to do so by the claimant who chooses to apply for adjudication, this period of time extends to around 6 weeks.

Under the West Coast model there is, of course, no statutory payment system. Therefore, the minimum period of time between a payment claim and an adjudication application will be subject to the contractually agreed payment provisions. The West Coast model provides that a party must apply for adjudication within 28 days after a dispute arises.⁷¹⁸ A dispute arises if by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed.⁷¹⁹ Under a typical standard form of building contract conditions, such as the AS 2124-1992 general conditions of contract, the principal has a period of 14 days after receipt of the payment claim to issue a payment certificate (which shall contain any

⁷¹⁶ See WA Act, s 27(1). S 29(1) of NT Act allows 10 working days.

⁷¹⁷ 15 business days under the SA Act – see s 14(4)(b)(ii).

⁷¹⁸ See WA Act, s 26(1).

⁷¹⁹ See WA Act, s 6(a).

reasons for withholding payment) and a further 14 days to pay the contractor.⁷²⁰ Thus, the minimum period of time from payment claim to adjudication determination will be approximately 6 weeks where the contractor disputes the certified amount,⁷²¹ and 8 weeks where the principal fails to pay the certified amount.

Accordingly, an adjudication determination will generally take 1 to 2 weeks longer to obtain under the West Coast model as compared to the East Coast model.⁷²²

7.3.3 Administrative Burden Generated by Statutory Adjudication

Due to the operation of a separate statutory payment system running alongside the contractual payment system, the East Coast model inevitably creates extra administrative workload above and beyond normal contract administration duties for parties on a construction contract. This is not the case under the West Coast model, which allows primacy of the contractually agreed payment system.

Under the East Coast legislation, a payment claim must, amongst other things, identify the construction work or related services to which the progress payment relates.⁷²³ Accordingly, the relevant construction work has to be identified ‘sufficiently to enable the respondent to understand the basis of the claim.’⁷²⁴ This is ‘a relatively undemanding test.’⁷²⁵ However, in *Protectavale Pty Ltd v K2K Pty Ltd*⁷²⁶ (*Protectavale*) the court held that a payment claim needs to identify which work has already been paid for. As Finkelstein J stated:

⁷²⁰ If no such timeframes are provided for in the building contract then the West Coast model implies the following provisions: a notice of dispute (stating reasons for disputing the claim) must be given within 14 days of the payment claim, and the due date for payment of any undisputed claim (or portion thereof) is 28 days after the payment claim is received by the paying party – see Schedule 1, Division 5 of the WA Act.

⁷²¹ Assuming the certificate containing reasons for withholding payment is issued at the end of the contractually prescribed period.

⁷²² Assuming the timescales stated in most Australian standard forms of building contract conditions, or provided for in the Schedule to the legislation.

⁷²³ See s13(2) of the NSW Act.

⁷²⁴ *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [25].

⁷²⁵ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)* [2005] NSWCA 409 at [48].

⁷²⁶ [2008] FCA 1248 (a Victorian case).

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 ... That is not an unreasonable price to pay to obtain the benefits of the statute.⁷²⁷

In finding that the payment claim did not sufficiently identify the construction work to which the claim related, and thus did not fulfil the requirements of the Act,⁷²⁸ his Honour observed:

what is noticeably absent from the invoice is any identification of the work previously completed and paid for and the work (apart from the variations) to which the invoice relates... The only information provided is that the amount is referable to the “Contract Sum” and “Payments Received”.⁷²⁹

Protectavale has subsequently been applied by the Supreme Court of Queensland in *Neumann Contractors P/L v Peet Beachton Syndicate Limited*⁷³⁰ (*Neumann*) and the Supreme Court of Victoria in *Gantley Pty Ltd v Phoenix International Group Pty Ltd*.⁷³¹

Protectavale may present a real problem for a claimant where, as is common on construction contracts, the contractual basis for a claim is the total value of construction works completed minus payments to date, and the claimant is not able to identify what has been paid for and what has not. As stated by Fenwick Elliott (2010b: 2):

The effect of these two cases [*Protectavale* and *Neumann*] appears to be that a progress [claim] that satisfies all the contractual requirements may nevertheless fail to satisfy the requirement of a payment claim under the Act. If a payment claim fails to satisfy the requirements of the Act, it is a nullity; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1.

Protectavale, therefore, has the potential to create an administratively complex task for claimants who need to ensure they keep track of which specific items of construction

⁷²⁷ *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [12].

⁷²⁸ Under s 17(2) of the Victorian Act.

⁷²⁹ *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [14].

⁷³⁰ [2009] QSC 376.

⁷³¹ [2010] VSC 106.

works have previously been paid for. This is a task which may be made especially difficult if the previous payments by the respondent are vague as to what is being paid for, and the numbers cannot be readily reconciled with previous claims.

In Victoria, where the Act uniquely excludes certain amounts from being taken into account in calculating the amount of a progress payment (as discussed in Chapter 6.5), there is anecdotal evidence to suggest that the increasing practice is for contractors to submit 2 claims each month: one under the contract and one under the Act, due to the clearly delineated differing entitlements under each of the payment systems.

The requirement for the respondent to prepare and serve a comprehensive payment schedule within 10 business days under the East Coast model,⁷³² in order to preserve its right to put forward the merits of its argument to the adjudicator in an adjudication response, is practicably onerous. Indeed, a significant number of respondents have lost their rights to lodge an adjudication response, and thus be heard by an adjudicator, on this basis (see further Chapter 7.4.1 (ii)). With respect to the NSW Act, Fenwick Elliot (2007: 3) has noted that this feature of the legislation:

sets up tens of thousands of procedural traps (one for every payment claim that is received) and if head contractors or principals fail to divert sufficient resources to the massive task of preparing the appropriate payment schedules, a claiming contractor or subcontractor is entitled to obtain a more or less default adjudication decision.

It would be hard to exaggerate the importance and the difficulty of providing payment schedules to every single payment claim that comes in to an office. A typical head contractor will receive a large number of payment claims each month, and it is extremely common for head contractors to fail to keep on top of the paperwork required by the legislation.

Brand & Uher (2008: 1282) suggest that ‘the sheer number of claims and the limited time available for their processing may require contractors to focus on defending larger payment claims as their top priority at the expense of smaller ones.’

⁷³² Except for SA, which allows 15 business days.

Furthermore, if a respondent rejects a payment claim in a payment schedule, this does not prevent a tenacious claimant from making the same claim month after month. The NSW Supreme Court has held that a simple repetition of matters included in an earlier payment claim is not an abuse of process under the NSW Act as long as the matters have not already been decided in an earlier adjudication.⁷³³

As noted by the NSW Department of Public Works and Services (2002: 21):

A vexatious claimant may serve the same payment claim repeatedly over a period of time, with the hope that the respondent will eventually fail to serve a payment schedule. The claimant could then recover the full amount of the claim through court under s 15 of the Act.

Therefore, a respondent may have to defend the same payment claim on several occasions throughout the duration of the construction contract, spelling out all of the reasons on each occasion.⁷³⁴

7.4 User Satisfaction

In Chapter 2, research was reviewed from the field of social psychology which established that whether a disputant believes that the resolution of the dispute was fair is a significant factor influencing their satisfaction with the outcome. Further, it was established from the research that, ‘In dispute resolution, the perception of a fair process can be as important as the reality of impartiality’ (Bingham 1997: 215). It was also seen from the dispute resolution literature that a distinction may be drawn between procedural and distributive justice. As such, as an indicator of user satisfaction, the levels of procedural and distributive justice afforded by the East and West Coast models will be considered.

As discussed in Chapter 2.8.5, a dispute resolution process which is not perceived by a party to be fair is likely to encourage that party to seek to undermine the outcome. In the context of statutory adjudication, this will mean seeking to challenge the adjudicator’s determination by judicial review. Therefore, user dissatisfaction derived from perceptions

⁷³³ *CC No 1 v Reed* [2010] NSWSC 294.

⁷³⁴ Although, note that in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd & Anor* [2009] NSWCA 157, the NSW Court of Appeal held that a payment schedule could indicate reasons for nil valuation by referring to previous payment schedule.

of unfairness may erode stability of outcome which, in turn, will decrease operational efficiency via increased transaction costs as disgruntled parties seek to challenge adjudicators' determinations in courts. Conversely, an adjudication scheme which is perceived as fair is more likely to encourage a losing party to accept an adjudicator's determination and, hence, deter it from challenging the determination or subsequently pursuing the dispute in costly court or arbitration proceedings.

There is very little data available in Australia with respect to user satisfaction with statutory adjudication. The very limited research that has been carried out in these respects is confined to NSW and is considered below. Ideally, a full evaluation of the East and West coast adjudication schemes would also include a consideration of more comprehensive research data with respect to users' experiences of statutory adjudication, and there is both scope and a need for further such research to be undertaken.⁷³⁵

7.4.1 Procedural Justice

From the perspective of the dispute resolution literature emanating from the field of social sciences (see Chapter 2.7), the East Coast model adjudication scheme suffers from several potential deficiencies in procedural justice which are not apparent in the West Coast scheme. These deficiencies may leave at least one of the parties to the dispute feeling that the procedure was unfair because, for example, they:

- have been denied access to adjudication for determination of their payment claim;
- have been denied an adequate opportunity to prepare an argument or put it to the adjudicator;
- perceive that the appointed adjudicator is not appropriately experienced or qualified to determine the payment claim; or
- perceive that an adjudicator has been prevented from considering the relevant facts and law when determining the payment claim.

⁷³⁵ In 2011, the Australian Legislation Reform Sub-Committee of the Society of Construction Law Australia attempted such a survey of construction lawyers across Australia. However, due to a very low response rate, the survey results were not published. A second attempt at such a survey, using a shorter form questionnaire, is currently being undertaken. The survey questionnaire may be viewed at: <http://www.scl.org.au/australian-legislation-reform>

More specifically, the potential procedural justice deficiencies of the East Coast model's adjudication scheme include:

- (i) the requirement for a contractor or supplier to endorse their payment claim as being made under the Act as a prerequisite to an adjudication application;
- (ii) the potential for the respondent to lose their opportunity to be heard by the adjudicator;
- (iii) the prohibition of legal representation at adjudication conferences;
- (iv) the allowance of amounts for damages claims under the contract in payment claims;
- (v) the lack of provision for either agreement as to the adjudicator identity or assurance of adjudicator quality;
- (vi) the perception that certain ANAs may have the incentive to be biased towards claimants;
- (vii) limiting the matters which an adjudicator may consider essentially to submitted documents only when making their determination; and
- (viii) the potential for claimants to have 'ambush' claims determined in adjudication.

(i) Endorsement of Payment Claims

A claimant under the East Coast model may only avail itself of the Act's dispute resolution processes if it endorses its progress payment as being made under the Act. This endorsement requirement is a potential barrier to procedural justice in the East Coast model, as a contractor or supplier may deliberately refrain from endorsing its payment claim through fear of negative repercussions⁷³⁶ in its relationship with the principal. This effectively denies such a contractor or supplier access to the dispute resolution process available under the Act. Indeed, a 2007 survey carried out by Brand and Uher (2010: 17), which sought to assess the performance of the NSW Act by surveying the members of two peak trade associations operating in NSW, found that:

⁷³⁶ Such as, in its most extreme form, being 'blacklisted' by the principal with respect to being offered work on future contracts.

Harmonisation of Security of Payment Legislation

Around half of the sampled contractor and subcontractor firms felt that endorsement of payment claims negatively affects to some degree the working relationship between the parties to a payment claim, with around 20 per cent responding that endorsement of payment claims negatively affects the working relationship “always/often”.⁷³⁷

Conversely, under the West Coast model, there is no such scope for a party to be deterred from accessing the Act’s dispute resolution process as statutory adjudication is available merely on the basis of a dispute having arisen on a contractual payment claim.⁷³⁸

(ii) Loss of Opportunity to be Heard by the Adjudicator

As seen in Chapters 2.7.2 to 2.7.4, a fundamental characteristic of procedural justice in dispute resolution is that both parties have an opportunity to voice their side of the argument. Numerous studies have made it clear that the voice effect significantly enhances the sense of a fair outcome. Accordingly, it is widely considered to be a fundamental principle in dispute resolution proceedings that each party shall be given a full opportunity to present its case.⁷³⁹ A strong argument may be made that the East Coast model falls foul of this fundamental principle based upon its denial to afford a respondent any opportunity to present its case to the adjudicator where the respondent has not duly served a payment schedule. In circumstances where the respondent is barred from participating in an adjudication,

The adjudicator may not know whether the respondent ... has a “killer point” in defence of the payment claim but has been deprived of the opportunity to raise it because, by oversight or misadventure, it failed to serve a payment schedule within the prescribed time.⁷⁴⁰

Indeed, in practice, a significant proportion of respondents have lost their right to be heard by an adjudicator on this basis. For example, the respondent failed to serve a payment

⁷³⁷ Nevertheless, the same survey showed that about two-thirds of respondent firms either “always” or “usually” endorse payment claims as being made under the Act – Brand & Uher (2010:16).

⁷³⁸ Under the West Coast model, either party may apply for adjudication of a payment dispute within 28 days after the dispute arises (see s 26(1) of the WA Act). A payment dispute arises if by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed (see s 6(a) of the WA Act).

⁷³⁹ See, for example: Article 18 of the *UNCITRAL Model Law on International Commercial Arbitration*; Article 6 of the *European Convention on Human Rights*; s 24 of the *Victorian Charter of Human Rights and Responsibilities Act 2006*.

⁷⁴⁰ *Brookhollow Pty Ltd v R and r Consultants Pty Ltd and Anor* [2006] NSWSC 1 at [59].

schedule after being served with a payment claim in 41% of all adjudication applications in both Queensland in 2010/11⁷⁴¹ and NSW in the three quarters of 2011/12.⁷⁴² Furthermore, having failed to serve a payment schedule at the first opportunity, ‘It appears that few respondents take the opportunity to provide a valid, relevant and meaningful ‘second chance’ payment schedule’ (Queensland Building Services Authority (QBSA) 2010: 12).

The NSW Supreme court has held that in the circumstances where no payment schedule has been served, the adjudicator should neither ‘rubber stamp’ the payment claim ‘in default of a defence’,⁷⁴³ nor ‘play devil’s advocate on behalf of the absent respondent’,⁷⁴⁴ by examining ‘all of the provisions of the contract and all of the provisions of the Act with a critical eye to see whether the claim is supportable.’⁷⁴⁵ Rather, the Court found that whilst an adjudicator must consider whether the issues appearing on the face of the payment claim conform with the provisions of the Act and of the contract, such consideration is limited to:

- whether there is in existence a construction contract between the parties and whether the payment claim is made pursuant to that contract;
- whether the payment claim reasonably purports on its face to comply with the requirements of s.13(2);
- whether there is evidence that the payment claim has been served on the respondent;
- what the contract provides, if anything, about the particular claim made in the payment claim and the time for payment;
- whether the claimant says that it has done the work for which the payment has been claimed but has not received payment.⁷⁴⁶

Furthermore, a respondent’s voice is similarly limited in the adjudication process by their not being allowed to include any reasons for withholding payment in its adjudication

⁷⁴¹ QBCIPA (2011).

⁷⁴² NSW Procurement (2012).

⁷⁴³ *Brookhollow Pty Ltd v R and r Consultants Pty Ltd and Anor* [2006] NSWSC 1 at [60].

⁷⁴⁴ *Ibid* at [62].

⁷⁴⁵ *Ibid* at [60].

⁷⁴⁶ *Ibid* at [64].

response, unless those reasons have previously been properly included in the payment schedule. The Queensland Supreme Court has even gone so far as to hold that:

where there is a payment schedule as well as a payment claim, the factual and legal issues for his [ie, the adjudicator's] adjudication are defined by those documents. If the validity of the claim depends on certain acts, the respondent's failure expressly to put those facts in issue in the payment schedule may amount to an admission of them. In *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495 where the respondent contended in its payment schedule that a value of "nil" should be ascribed to the claim because certain deductions ought be made from the amount claimed, the adjudicator properly treated the payment schedule as impliedly admitting the claimant's valuation of the work.⁷⁴⁷

Although an impediment to procedural justice in the context of dispute resolution, it may be argued for a couple of reasons that the East Coast model's strict payment schedule provisions have some merit in the context of the scheme as a rapid certification process with no dispute resolution intent.

First, the strict payment schedule provisions protect the efficiency of the adjudication process by preventing a respondent from being able to request extensions for submitting its reasons for withholding payment (as, for example, may be done with respect to the lodging of a defence in the courts). Indeed, on this basis, there is a case for making the adjudication process even more efficient by shortening the period in which the adjudicator has to make his or her determination where no payment schedule has been served, as per the Singapore Act (see Chapter 6.10).

Secondly, as Davenport (2010b: 45) contends:

The claimant must be given a fair opportunity of deciding whether to contest the respondent's reasons and, if so, to do so in the adjudication application. The claimant is not entitled to raise new claims in the adjudication. The respondent is not entitled to raise new reasons for withholding payment.

This represents a harsher line on the respondent than is taken under the common law with respect to the contractual certification process. With respect to the enforcement of

⁷⁴⁷ *John Holland Pty Ltd v Walz Marine Services Pty Ltd and Ors* [2011] QSC 39 per Wilson J at [54].

contractual payment certificates in court, the established common law position is to allow a defendant to thwart a plaintiff's application for summary judgement by the raising of a cross-claim for which the defendant can show a reasonable cause of action, even if such cross-claim is raised for the first time after the date of certification (see Chapter 4.3.5).⁷⁴⁸ The courts have adopted this position in order that⁷⁴⁹ a defendant who may have a valid case for a cross-claim against a certified contractual payment will not be denied their right to have their case heard before payment is ordered, because to deny such a right would deprive the defendant of both procedural and substantive justice. This is not dissimilar, in principle, to the situation where a respondent has a valid reason for withholding monies in a payment claim under the East Coast model's payment system, but did not raise the reason in a payment schedule.

Indeed, if the East Coast model is viewed as akin to an independent certification process with an adjudicator's determination equating to an independent payment certificate, then a reason for withholding payment raised by a respondent for the first time in its adjudication response would actually be notified to the independent certifier (the adjudicator) within a reasonable amount of time before the independent payment certificate (adjudicator's determination) is due to be issued. Indeed, it is worth noting since being amended in 2007, the Victorian Act differs from the other East Coast Act in that it allows a respondent to include reasons in their adjudication response which were not included in their payment schedule, and gives a claimant 2 business days to lodge a response to the adjudicator in reply to such reasons (see Chapter 6.5).

The practical problem with the common law position for plaintiff contractors trying to recover payment, however, has been the duration and expense of a full litigation process. As such, when a contractor's summary judgment application is denied, the contractor simply cannot afford to pursue its payment claim in a full court trial. This impracticality of the court system has caused injustice to contractors. However, it should not present such a problem if a rapid and inexpensive statutory adjudication process is available to the claimant.

⁷⁴⁸ Although, as discussed in Chapter 4.3.5, the courts have construed several standard forms of construction contract in Australia as clearly implying that a principal's common law and equitable rights to set-off are excluded.

⁷⁴⁹ In the absence of a clear express or implied contractual agreement between the parties to the contrary. See further Chapter 4.3.5.

It would, therefore, appear from the strict East Coast payment schedule provisions that Parliament intended that the common law requirement of natural justice (see Chapter 3.12.2) not be applied where a respondent has failed to serve a payment schedule. For the adjudication of smaller progress payment claims, such intent may be said to be consistent with the requirement for procedural fairness in administrative decision making being proportionate to the consequences of the decision (as discussed in Chapter 3.12.2). The opposite may be said, however, for the adjudication of larger payment claims, where the consequences of a determination are financially graver.

Unlike the East Coast model, the West Coast model provides no detailed statutory payment system but rather gives primacy to the parties' agreed contractual payment regime if one exists. The West Coast legislation does not make the serving of a response to the payment claim⁷⁵⁰ a condition precedent to the right of a party who is served with an adjudication application⁷⁵¹ to lodge an adjudication response. Additionally, there are no limitations as to the inclusion of reasons for withholding payment in a response to an adjudication application. Thus, providing that a party lodges their response to an adjudication application within the time allowed by the legislation,⁷⁵² it will not be deprived of the opportunity to present its full case. This would appear to be a far more satisfactory approach in terms of achieving procedural and substantive justice in the dispute resolution process.

(iii) Barring of Legal Representation at Conferences

The East Coast model does not permit the parties any legal representation.⁷⁵³ The West Coast model allows the adjudicator to determine his or her own adjudication procedure,⁷⁵⁴ and does not specifically preclude legal representation at hearings. Thus, under the West Coast model legal representation at conferences is at the adjudicator's discretion.

⁷⁵⁰ *Ie*, the equivalent of a 'payment schedule' in East Coast terminology. Although under the West Coast legislation a response to a payment claim is a contractual requirement rather than a statutory requirement.

⁷⁵¹ *Ie*, the equivalent of the 'respondent' in East Coast terminology.

⁷⁵² Within 14 days (WA Act, s 27(1)) or 10 working days (NT Act, s 29(1)) after the date on which a party to a construction contract is served with an application for adjudication.

⁷⁵³ See NSW Act, s 21(4A).

⁷⁵⁴ See WA Act, s 32(6).

Whilst the preclusion of legal representation at conferences contributes to keeping the costs of the adjudication process to a minimum, such preclusion may be detrimental to real and perceived procedural justice if it prevents the parties from properly articulating their arguments. This may particularly be so in disputes where the issues are of a complex nature, such as disputes regarding damages claims. In such disputes the barring of legal representation may, indeed, be a false economy if one of the parties subsequently pursues the dispute in litigation or arbitration due to a feeling of dissatisfaction with the way their case has been presented and/or understood in the adjudication process. By common law standards (as discussed in Chapter 3.12.2), it seems likely that barring legal representation in adjudications where complex issues are concerned, or one of the parties is not capable of presenting its case, would amount to a denial of natural justice.

In discussing the issue of legal representation in unfair dismissal proceedings, Mourell and Cameron (2009: 72) suggest that the enforced absence of lawyers may negatively impact on, amongst other things, legal truth, efficiency, and emotional costs. Furthermore, they argue that barring legal representation at conferences has the effect of exacerbating the power imbalance between smaller and larger disputants. As they put it (2009: 66):

While the employee may be unrepresented at a conference or hearing, the corporate employer can select a representative, being a natural person within the corporation, to act on its behalf. According to Professor Stewart and Murray Wilcox QC, the chosen representative in larger corporations is likely to be a human resources manager with legal training and/or experience ... As a consequence, the employer may receive an unfair advantage through its greater knowledge of and experience in unfair dismissal matters. The complexity of the factual and legal issues relating to the proceeding will determine the gravity of that power imbalance.

In the context of statutory building adjudication, this equates, for example, to an adjudication between a small subcontractor and a larger corporate principal, where the principal's chosen representative in a conference called by the adjudicator is one of its employees, eg a senior contracts administrator, who has received training in the security of payment legislation.

Further, whilst the East Coast model bars legal representation at conferences, this does not preclude a party from obtaining legal advice outside conferences. Thus, the cost saving to

a party who engages a legal professional is likely to be minimal and to be outweighed by the inefficiency which will arise in the party having to present arguments prepared by their lawyer at conferences; a task for which they are not trained and are unlikely to be able to do well.

(iv) Allowance of Amounts for Delay Damages in Payment Claims

Although the NSW Supreme Court has found that delay damages are not amounts for construction work done pursuant to a construction contract,⁷⁵⁵ it has upheld adjudicators' determinations which include amounts for delay damages on the basis that it is within the adjudicator's jurisdiction to determine whether such amounts be allowed in payment claims.⁷⁵⁶ In other words, the erroneous inclusion by an adjudicator of such amounts in the adjudicated amount does not render their determination void.⁷⁵⁷ According to Brand and Davenport (2010: 5), this creates an 'imbalance' as only one party is allowed to apply for adjudication of payment disputes regarding damages falling within the scope of the contract. As claims for damages falling within the scope of the contract have the potential to be made by either contractual party, it is procedurally unfair to allow only one party the right to refer such claims to the Act's dispute resolution process. Such procedural unfairness does not exist under the West Coast model, which allows both parties to make adjudication applications for payment claims including damages within the scope of the contract.

The difference in assessed progress payment amount between the statutory entitlement (as determined by the adjudicator), under the Australian East Coast model legislation, and the contractual entitlement (as determined by the contract administrator) appears to have resulted in some confusion and inconsistency with respect to what amounts should or should not be included in an adjudicator's determination. Accordingly, with respect to set-offs under the current East Coast adjudication process, Davenport (2007: 22) states:

⁷⁵⁵ *Coordinated Construction Co v J M Hargreaves and Ors* [2005] NSWSC 77 at [40], citing *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 per Barrett J at [34].

⁷⁵⁶ 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 v Contrax Plumbing (NSW) Pty Ltd & Ors* [2005] NSWCA 142; and, *John Holland Pty Limited v Roads & Traffic Authority of New South Wales & Ors* [2007] NSWCA 19.

⁷⁵⁷ See *Coordinated Construction Co v J M Hargreaves and Ors* [2005] NSWSC 77 at [53].

There are differences in the approach taken by adjudicators. Some take the approach that only a debt (owed to the purchaser) that is admitted by the supplier or has been decided by a court or tribunal or in arbitration or has been created under a dispute resolution clause in the contract, can be set off against progress payments ... Other adjudicators decide disputed issues of liability for and quantum of the back charges ... Some adjudicators allow a set off of an amount claimed by the purchaser even if liability and quantum have not been proven.

This inconsistent approach further erodes procedural justice as it breaches the consistency rule of procedural justice judgments seen in Chapter 2.7.7.

The Victorian Act, however, may be said to redress the procedural unfairness inherent in the East Coast model, which allows only one party (the claimant) to refer such damages claims to adjudication, by way of the limiting provisions that expressly prohibit claims for damages (as discussed in Chapter 6.5) introduced in 2007 when the Act was amended. However, it is worth noting that these limiting provisions may have given rise to other undesirable effects. These include, possibly, deterring the usage of statutory adjudication (as discussed in Chapter 7.2) and the submission of two payment claims by contractors due to the clearly delineated difference in payment entitlement between the contractual and statutory payment systems (as discussed in Chapter 7.3.3).

Furthermore, as discussed in Chapter 6.5, the Victorian Act's limiting provisions extend to applying a monetary cap to payment claims for disputed ("class two") variations, which Zhang (2009: 395) notes 'creates a significant problem for head contractors who are liable to subcontractors below but unable to utilise the scheme against the principal above because the sums they work with are too large.'

(v) Lack of Provision to Agree Adjudicator Identity or to Assure Suitable Quality of Adjudicator

As discussed in Chapter 6.6, under the East Coast model adjudication applications are made to an ANA chosen by the claimant.⁷⁵⁸ It is then the duty of the chosen ANA to refer applications to one of the adjudicators on their panel.⁷⁵⁹ The disputing parties, therefore, cannot agree upon the appointment of a particular individual as adjudicator. Under the

⁷⁵⁸ See NSW Act, s 17(3).

⁷⁵⁹ See NSW Act, s 17(6).

West Coast model, the parties to the contract may agree upon a registered adjudicator or prescribed appointor.⁷⁶⁰ The provision to agree upon a particular individual as adjudicator may be significant to the disputing parties' perception of procedural justice. This is particularly so where the issues in dispute are of a legally and factually complex nature (such as disputes regarding payment of amounts for damages under the contract), and the parties would prefer the appointment of an adjudicator who they feel is suitably qualified and experienced, and in whom they have mutual confidence, to determine the dispute in hand within a restricted timeframe. This is particularly pertinent where adjudicators may be determining disputes regarding amounts for damages under the contract which are likely to be more legally and factually complex in nature than determining purely progress payment claims.

It may, however, be argued that blind adjudicator appointment, as per the East Coast model, denies the opportunity for a party with dominant bargaining power to unfairly influence the identity of the adjudicator at the time of contract formation and thereby erode perceived procedural justice. As noted in Chapter 6.10, the NZ Act circumvents this problem by providing that any agreement about the choice of adjudicator or ANA/prescribed appointor is not binding if it was made before the dispute arose.⁷⁶¹

Furthermore, as discussed in Chapter 6.6, whilst the West Coast model Acts require adjudicators to be registered and set out eligibility criteria, the only East Coast model Act which requires adjudicators to be registered is the Queensland Act. Although the other East Coast Acts provide that the adjudicator must possess the qualifications, expertise and experience prescribed by the regulations, this has only actually been done in SA.⁷⁶² Thus, with the exception of Queensland and SA, 'the appropriate benchmarks remain at the discretion of the Authorised Nominating Authority ...' (Zhang 2009: 396). Therefore, not only are the parties prevented from agreeing on a particular adjudicator, but there is also no transparent assurance procedure with respect to the quality of the adjudicator blindly

⁷⁶⁰ See WA Act, s 26(1)(c).

⁷⁶¹ See NZ Act, s 33(3).

⁷⁶² See the *Building and Construction Industry Security of Payment Regulations 2011* (SA), s 6.

appointed to the parties' dispute by the ANA. As Zhang (2009: 396) observes,⁷⁶³ with respect to the NSW Act:

Adjudicators need to be better qualified to deal with the complexities and time requirements of security of payment. Overseas jurisdictions such as the United Kingdom and New Zealand acknowledge that the risks of injustice inherent in the scheme demand a high standard of expertise.

(vi) Perceived Bias in Adjudicator Appointment

As discussed in Chapter 6.6, the East Coast model allows the Minister to authorise ANAs to nominate adjudicators for the purposes of the Act.⁷⁶⁴ The adjudication application must be made to an ANA chosen by the claimant⁷⁶⁵ who, under the East Coast model, can only be a contractor (or supplier) and not a principal. All ANAs take a commission from the fee paid by the disputing parties to the adjudicator. The level of this commission widely varies between the different appointing bodies, from around 10% for some professional bodies to, as alluded to by Evans (2009: 4617), around 40% for some 'for profit' companies, depending upon the level of services each provides to their adjudicators (overhead costs) and the profit margin (if any) each seeks to gain from appointing adjudicators. The largest ANA in Australia is a 'for profit' company which states on its website that: 'Despite many competitors, over 60% of all matters nationally are referred to us' (Adjudicate Today 2012).

Given that profit-driven ANAs stand to gain from repeat business from claimants, allowing such bodies to appoint adjudicators may create a perception in the mind of the respondent that adjudicators appointed by such 'repeat player' ANAs may be biased⁷⁶⁶ towards claimants (see Chapter 2.9.3). By common law standards (as discussed in Chapter 3.12.1), there is a strong case that such appointments would give rise to a reasonable apprehension of bias by the adjudicator due to an indirect pecuniary interest in the proceedings. As Shnookal (2009: 12) states in the Victorian context, 'some ANAs have built the reputation of being more claimant friendly than others and are selected on this basis.'

⁷⁶³ Citing Fisher (2005: 114).

⁷⁶⁴ See s28(1)(a) of the NSW Act.

⁷⁶⁵ See s 17(3) of the NSW Act.

⁷⁶⁶ As discussed in Chapter 2.7.6, neutrality of the decision maker is an important determinant of whether a procedure is fair.

It should be noted that no evidence exists to suggest that any of the ANAs are actually biased in favour of claimants. However, regardless of actuality, a procedural justice deficiency may still be said to exist because, as discussed in Chapter 2.7.2, perceptions of a fair process can be as important as the reality of impartiality.

This issue of perceived ANA bias is amplified, and more likely to be seen as a problem, in the adjudication of larger payment claims where the dollar value commissions taken by the ANAs from their adjudicators are higher. The consequences of an adjudication determination for a large amount being biased in favour of the claimant, even if it is only binding in the interim, could potentially be commercially catastrophic to even the largest of respondents (as discussed further in Chapter 7.4.2).

Conversely, the issue of perceived ANA bias is not such a significant issue for lesser payment claims, which are more likely to be made by smaller, commercially vulnerable businesses in the lower tiers of the contracting chain. Indeed, given the East Coast legislation's focus on protecting the smaller contractor, a reversal in the imbalance of payment power between the parties, by putting the choice of adjudicator for disputed money into the hands of the weaker party, may actually be justified.

As explained in Chapter 6.6, the West Coast model prescribes appointers of registered adjudicators in the regulations to the Act, and the parties may agree to refer their dispute to one of these appointers or directly to a registered adjudicator. In the absence of such an agreement, either of the parties may serve an adjudication application on a prescribed appointer of their choice. The fact that parties may agree upon the identity of a particular adjudicator prior to a payment dispute arising, for example in the construction contract, opens the possibility that a party with dominant bargaining power may be able to unfairly influence the identity of the adjudicator.

On the other hand, it is worth noting that no 'for profit' prescribed appointers exist in the West Coast jurisdictions, all being professional bodies or associations. Further, because either contractors or principals may be claimants under the West Coast model (depending on the type of payment claim), there is *less* room for any perception, as exists under the

East Coast model, that it is in the commercial interests of certain ANAs to be biased towards claimants in order to gain their repeat business.

(vii) Limiting the Matters which an Adjudicator may Consider

As seen in Chapter 6.7, an adjudicator under the East Coast model is restricted when making their determination to a consideration of the provisions of the construction contract, the payment claim and payment schedule with all duly made submissions, and the results of any inspection the adjudicator carries out in relation to a matter to which the claim relates. This, in effect, means that an adjudicator may only consider the matters raised in the documents submitted by the disputing parties. The West Coast model provides that an adjudicator ‘is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.’⁷⁶⁷ This has the effect of extending the adjudicator’s investigative powers beyond the mere consideration of the parties’ submissions, thus assisting the adjudicator in ascertaining the facts and law relevant to the determination of the payment claim. This approach would seem far more likely to result in an outcome which is palatable to both parties to the dispute, if not only for the perception that the adjudicator has had an opportunity to discover all the relevant facts and law when evaluating the payment dispute.

(viii) Ambush Claims

Under the East Coast model, it is possible for a claimant to spend several months preparing a comprehensive and lengthy payment claim for a substantial monetary amount and including amounts for damages under the contract, leaving the unsuspecting respondent only ten business days⁷⁶⁸ to respond in its payment schedule.⁷⁶⁹ By way of example, Davenport (2006: 147) refers to *Contrax Plumbing*, where the claimant contractor made a progress claim including an ambit claim for approximately \$2 million which took 12 months to prepare and was supported by two boxes of files detailing the claimant’s allegations. This is clearly a procedurally unfair practice.

⁷⁶⁷ See s 32(1)(b) of the WA Act, and s34(1)(b) of the NT Act. Note that the NT Act substitutes the word ‘appropriate’ for ‘fit’ in this provision.

⁷⁶⁸ Or, as noted above, 15 business days in the case of the SA Act.

⁷⁶⁹ See s 14(4)(b)(ii) of the Act.

Whilst a similar ‘ambush claim’ may also be attempted under the West Coast model, as discussed in Chapter 6.7, the West Coast model does allow an adjudicator to dismiss an adjudication application if he or she is 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.⁷⁷⁰

Other potential solutions to the problem of ambush claims may be to amend the legislation so as to give the adjudicator the power to:

- limit the length of written documents or oral representations in a similar manner to *The Scheme for Construction Contracts Regulations*⁷⁷¹ in the UK; or
- extend the time the adjudicator has to reach his or her decision without the consent of the parties.

Alternatively, if the inclusion of damages claims under the contract and/or contended variation claims were strictly prohibited, along the lines of the Victorian Act (as discussed in Chapter 6.5), the potential for ambush claims should be significantly limited.

7.4.2 Distributive Justice

There are several features of the East Coast, but not the West Coast, model adjudication scheme which may lead to at least one of the disputing parties perceiving that the amount awarded in the adjudicator’s determination is not fair, ie that it lacks distributive justice. All of the procedural fairness deficiencies that plague the East Coast adjudication scheme, as discussed in Chapter 7.4.1, have the potential to affect the distributive outcome and, therefore, also impact upon the real or perceived fairness of the adjudication determination. For example, it is highly unlikely that distributive justice will be perceived by:

- a contractor who has not endorsed their payment claim as being made under the Act for fear of negative repercussions and is paid less than the amount it claimed;

⁷⁷⁰ WA Act, sw 31(2)(a)(iv).

⁷⁷¹ Part I, s 13(g).

- a party who, having had no opportunity to agree the identity of the adjudicator, has received an unfavourable determination from an adjudicator of whom they have neither heard nor have confidence in;
- a respondent who, having been denied an opportunity to serve an adjudication response, must pay the full amount of the payment claim as determined by an adjudicator;
- a claimant or respondent who, not being allowed legal representation in an adjudication hearing, is unable to properly articulate their arguments and receives an unfavourable adjudication determination;
- a respondent who must pay amounts for delay damages awarded in an adjudication determination, but is not allowed apply for an adjudication for liquidated damages it contends the claimant is liable for under the contract;
- a respondent who, despite having put forward their arguments in a payment schedule and subsequent adjudication response, must pay the full amount of the payment claim as determined by an adjudicator appointed by a ‘for profit’ ANA which stands to gain from the claimant’s repeat business;
- a party who has received an unfavourable determination from an adjudicator who was prevented from considering relevant facts and law, which were not raised in the parties’ duly made submissions; or
- a respondent who, having had only a few weeks to prepare a defence to the claimant’s voluminous and detailed multi-million dollar ambit claim, receives an unfavourable adjudication determination.

Where a respondent loses its opportunity to present its case due to having failed to serve a payment schedule, the adjudicator’s determination is highly likely to be more favourable to the claimant than if the respondent’s case could have been heard. The QBSA (2010: 11) reports that for all the adjudication applications decided in 2008/2009 where the respondent served a payment schedule on the claimant, indicating an intention to pay less than the claimant was seeking and supporting this decision with reasons, the average amount awarded to claimants represented 36% of the total amount they claimed. In contrast, the average amount awarded to claimants for all the adjudication applications

decided in 2008/2009 where the respondent failed to serve a payment schedule in response to the payment claim represented 75% of the total amount claimed.

In addition to the negative perceptions of distributive justice which may result from the East Coast adjudication scheme, the East Coast adjudication scheme is unsuitable for the attainment of actual distributive justice. It is contended that, as a rights-based determination process, adjudication determinations should accord to the distributive rule of adhering to commitments (as discussed in Chapter 2.7.1) in order to be fair, which dictates that fairness is violated unless persons receive that which has been promised to them. In the context of a construction payment dispute, this would equate to a distribution according to that agreed to by the parties in the construction contract. In other words, the timing and amount of payment should be in accordance with that promised in the contractual payment provisions.⁷⁷²

However, as discussed in Chapter 7.4.1, it is the intent of the East Coast legislation that certain amounts which the parties may be entitled to be paid under the contract (eg, delay damages and liquidated damages), are excluded from the statutory payment scheme. Thus, there may well be a difference between the statutory payment entitlement (as assessed by an adjudicator) and the contractual payment entitlement. As stated by the Editor of the *Building and Construction Law Journal* (2005: 327), with respect to the ‘manifest shortcomings’ of the NSW Act, ‘the construction law community has long and hard pointed to the inadequate reconciliation between the statutory progress payment entitlement and that under the relevant contract.’ In *Walter Construction Group v The Robbins Company*,⁷⁷³ McDougall J stated:

I do not accept that the determination of the adjudicator provides any convincing indication of the amount of the plaintiff's entitlement ... I think that the inherent limitations in the adjudication process, and the interim nature of the procedure, mean that it could not be seen as an accurate predictor of the outcome of a fully prepared hearing.

It may be argued that any such inadequate reconciliation, which leads to a determination unduly (from a contractual point of view) in favour of the claimant, is justified in the

⁷⁷² See Chapter 4.3.4 with respect to valuation of payment certificates under construction contracts.

⁷⁷³ [2004] NSWSC 549 at [30].

context of contracts between smaller contractors and their principals. This is because reversing the imbalance of payment power in such contracts, by putting the disputed payment monies into the hands of the smaller contractor, accords with the parliamentary focus, when passing the East Coast legislation, on protecting small business (see Chapter 6.3). Indeed, this accords with the concept of a remedial statute, as discussed in Chapter 2.9.2, transferring the rule advantage held by larger repeat players to smaller one-shotters.

Such an argument, however, holds little traction for disputes over larger payment claims which are likely to involve larger parties, who have contracted on a more equal footing in terms of bargaining power. As such, there is far less justification for a determination which departs from the agreed contractual payment provisions. Further, the consequences of a determination for a large amount, which is unduly (from a contractual point of view) in favour of a claimant contractor, could quite possibly be commercially catastrophic to the respondent, even if such a determination is binding only in the interim. As Jacobs (2010: 22) states:

The person called on to pay by reason of a [sic] adjudicator's determination, could be sent to the bankruptcy courts, by an adjudication determination that bears no resemblance to a determination of the correct liability if any. It will be up to that person's trustee in bankruptcy to bring an action to correct the imbalance, but the weirdness of the system dictates that it will be up to the moving party in an action or arbitration brought to challenge the adjudicator's determination to attempt to prove that the money paid pursuant to the adjudication determination was not owing. Without apparently realising this consequence, the legislature has turned the usual onus of proof on its head.

The only empirical research which has been done to survey perceptions of distributive justice was that carried out by Brand and Uher (2010) who, as mentioned in Chapter 7.4.1, surveyed the members of two peak trade associations operating in NSW. In their survey, Brand and Uher (2010: 19) asked, 'Has the [NSW] Act created a fair and balanced payment standard?' In response, 29% of contractors (who are predominantly respondents under the Act) and 40% of subcontractors (who are predominantly claimants) replied 'yes'. The rest either replied 'no' or 'not sure'.

7.5 Effect on Relationship

As seen from the dispute resolution literature reviewed in Chapter 2.7.3, if parties perceive that a dispute resolution process is procedurally fair, their relationship benefits and the dispute is less likely to recur. Further the research shows that rights-based resolution processes, such as statutory construction adjudication, typically makes the relationship between the disputing parties more adversarial and strained (see Chapter 2.5.1). Therefore, in order that the disputing parties' commercial relationship has the best chance of continuing, it is extremely important that the parties perceive that the process has been procedurally and distributively just. Accordingly, when comparing the impact of the UK and East Coast model adjudication schemes on the parties' relationship, Coggins, Fenwick Elliott and Bell (2010: 32-33) state:

The UK Model is even more evaluative than the West Coast model, in that the adjudicators are under a duty to exercise their initiative to ascertain the facts and the law. Before the UK legislation was passed by the Housing Grants, Construction and Regeneration Act 1996, the construction industry there was (per Latham 1993) suffering badly from a lack of trust engendered by the ability of paymasters to delay or evade payment with relative impunity. Since that legislation was implemented, there has been a considerable improvement, and all parties (including, importantly, head contractors) appear to regard adjudicators' decisions as generally fair, and the industry has benefited from much more balanced and productive relationships between contracting parties. Parties who have been through adjudications inter se have often moved on rapidly to an enhanced working relationship. Conversely, anecdotal evidence suggests that East Coast model adjudications are not typically perceived by both parties as fair, and often lead to a total breakdown of the commercial relationship between the adjudicating parties.

The only empirical research which has been done to survey the impact of the legislation on the parties' relationship was the aforementioned study (see Chapter 7.4.2) carried out by Brand and Uher (2010). Brand and Uher's survey, however, did not enquire into the impact of the adjudication process, but rather the impact of endorsing a payment claim as being made under the NSW Act, on the parties' relationship. As reported in Chapter 7.4.1, around half of the firms who responded to the survey felt that payment claim endorsement negatively affected the relationship to some degree. Further, there is anecdotal evidence to suggest that some subcontractors are being put under duress in the form of threats by certain contractors that, if they endorse payment claims, they will not be invited to work for the contractor again.

7.6 Stability of Outcome

A measure of stability of outcome may be gauged from the volume and nature of litigation pursuant to adjudicators' determinations. Two categories of such litigation could arise. The first category is litigation initiated to challenge the validity of the adjudicator's determination. The second category is litigation (and arbitration) initiated not to challenge an adjudicator's determination, but in order to obtain a final binding determination of a dispute which was determined in the interim by way of an adjudicator's determination. Due to the absence of research into the second category in Australia, which represents a further research opportunity, this chapter will only consider litigation in the first category.

Initially, the volume of judicial judgments which have considered security of payment legislation will be considered. Subsequently, the nature of issues raised in this body of case law will be discussed, including the circumstances under which the courts have held that judicial review of adjudicators' determinations is available.

As noted in Chapter 2.8.5, stability of outcome is directly related to efficiency of a dispute resolution system, due to the consequential costs of any subsequent dispute resolution arising. Therefore, volume of litigation flowing from adjudicators' determinations is also indicative of operational efficiency. The nature of the issues which have been successfully litigated by plaintiffs is also relevant in that it impacts on the perceived efficacy, and hence use, of statutory adjudication in the construction industry. This is especially true with respect to the circumstances under which the courts have determined that an adjudicator's determination may be rendered invalid and unenforceable.

7.6.1 Volume of Litigation

Since its commencement, and contrary to the parliamentary desire to limit judicial involvement (as discussed in Chapter 6.3), the NSW Act has generated a plethora of litigation. As stated by the Honourable Justice Robert McDougall (2009: 10):

In spite of the [parliamentary] intention to keep the courts away from this interim payment process [under the NSW Act], which I acknowledged in *Musico*, the courts have often been called upon to

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intervene. Whilst the scope for judicial review is limited by Parliament, it is only limited to the extent expressed or necessarily implied by the words of the Act.⁷⁷⁴

Table 7.5 shows the number of judgments, which consider the legislation, emanating from the Supreme Courts and Courts of Appeal since commencement of the legislation in NSW, Queensland, Victoria, WA and NT. It may be seen that there are significantly more judgments in NSW than any of the other jurisdictions. After NSW, Queensland has had the most amount of judgments. Notably, the number of judgments in Queensland appears to have escalated considerably since 2009, with approximately 70% of the judgments occurring over the last three years. The West Coast jurisdictions of WA and NT have had by far the least amount of judgments.

Whilst it may be expected for NSW and Queensland to have more judgments, due to the higher usage of adjudication in those States, it is apparent that there are far more matters taken to the courts in NSW and Queensland proportionate to adjudication applications than in WA. Between 2003 and 2008,⁷⁷⁵ there has been in the order of 1 court judgment for every 26 adjudication applications in NSW. Since their respective legislation commenced, there has been in the order of 1 court judgment for every 53 adjudication applications in Queensland, 1 court judgment for every 22 adjudication applications in Victoria, 1 court judgment for every 89 adjudication applications in WA,⁷⁷⁶ and 1 court judgment for every 24 adjudication applications in NT. Although it should be noted that the number of adjudications in NT since the legislation commenced (approximately 70) is significantly less than in each of NSW, Queensland, Victoria, and WA.

⁷⁷⁴ Citing *Musico v Davenport* NSWSC 977 at [35].

⁷⁷⁵ As explained in Chapter 7.2, adjudication data was only available up until 2008 from NSW Procurement. Although, as from the first quarter of 20011/12, NSW Procurement has once again started to publish adjudication data.

⁷⁷⁶ There were also 17 applications to the State Administrative Tribunal (SAT) in WA under the powers of review given to the SAT in the WA Act (as discussed in Chapter 6.8). The vast majority of these applications were made under section 46(1) of the WA Act, which states that a person who is aggrieved by a decision made by a registered adjudicator under section 31(2) (a) to dismiss an application for adjudication may apply to the SAT for a review of the decision.

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Table 7.5 – Number of Supreme Court and Court of Appeal Judgments Considering the Security of Payment Legislation (to end of Jan 2012)

Year	NSW ⁷⁷⁷		Queensland ⁷⁷⁸		Victoria ⁷⁷⁹		WA ⁷⁸⁰		NT ⁷⁸¹	
	Supreme Court	Court of Appeal	Supreme Court	Court of Appeal	Supreme Court	Court of Appeal	Supreme Court	Court of Appeal	Supreme Court	Court of Appeal
2001	3	0	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2002	6	3	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2003	16	2	N/A	N/A	0	0	N/A	N/A	N/A	N/A
2004	42	5	0	0	0	0	N/A	N/A	N/A	N/A
2005	38	9	2	0	1	0	0	0	0	0
2006	37	4	8	1	2	0	0	0	0	0
2007	30	5	7	1	2	0	1	0	1	0
2008	26	3	5	2	0	0	1	0	1	0
2009	29	7	21	1	6	1	1	0	1	0
2010	24	4	20	5	5	0	1	0	0	0
2011	16	3	9	1	3	1	3	1	0	0
Total	267	45	72	11	19	2	7	1	3	0

⁷⁷⁷ These judgments have been counted from a search on the LexisNexis online database at: < <http://www.lexisnexis.com/au/legal/search/flap.do?flapID=cases&random=0.5256003658090265>>, carried out on 31 Jan 2012, for court judgments judicially considering the *Building and Construction Industry Security of Payment Act* (NSW).

⁷⁷⁸ These judgments have been counted from a search on the LexisNexis online database at: < <http://www.lexisnexis.com/au/legal/search/flap.do?flapID=cases&random=0.5256003658090265>>, carried out on 31 Jan 2012, for court judgments judicially considering the *Building and Construction Industry Payments Act* (Qld).

⁷⁷⁹ These judgments have been counted from a search on the LexisNexis online database at: < <http://www.lexisnexis.com/au/legal/search/flap.do?flapID=cases&random=0.5256003658090265>>, carried out on 31 Jan 2012, for court judgments judicially considering the *Building and Construction Industry Security of Payment Act* (Victoria).

⁷⁸⁰ These judgments have been counted from a search on the LexisNexis online database at: < <http://www.lexisnexis.com/au/legal/search/flap.do?flapID=cases&random=0.5256003658090265>>, carried out on 31 Jan 2012, for court judgments judicially considering the *Construction Contracts Act 2004* (WA).

⁷⁸¹ These judgments have been counted from a search on the Thomson Legal Online database website at: < <http://legalonline.thomson.com.au/cases/>>, carried out on 10 Feb 2012, for court judgments judicially considering the *Construction Contracts (Security of Payments) Act* (NT).

It is suggested that one possible explanation for this abundance of litigation in NSW and Queensland is the deficiencies in procedural⁷⁸² and distributive justice inherent in the East Coast legislation as discussed in Chapter 7.4.1 and 7.4.2. A further explanation could be that, as discussed in Chapter 2.9.2, the litigation represents an attempt by larger repeat players to ‘play for rules’ in the court system in order to erode the effectiveness of the remedial security of payment legislation which has transferred rule advantage to the one-shot players in litigation.

The majority of the judgments in NSW and Queensland concerns cases where respondents, unhappy with the adjudicator’s determination, have attempted to have payment claims, adjudication applications or adjudicators’ determinations declared invalid. Furthermore, these cases invariably concern payment claims or adjudication applications for significant amounts of money (usually, at least, hundreds of thousands of dollars). As such, Zhang (2009: 395) states:⁷⁸³

When modern security of payment legislation was implemented, it was unlikely that legislators foresaw the amount of litigation that would ensue. This was particularly the case in New South Wales, which set the battleground for limiting adjudication appeals. The irony is that the scheme is aimed at reducing litigation and ensuring prompt interim payment.

The large amount of litigation generated from adjudicators’ determinations in NSW and Queensland is detrimental to the construction industry due to the significant costs associated with litigation (as discussed in Chapter 2.2.1) and the inevitable negative effect litigation has on the disputing parties’ relationship. It is also indicative of the fact that the East Coast adjudication process, designed as a certification process to get cash flowing, fails to actually lead to final resolution of disputes regarding larger payment claims either by:

- encouraging the parties to use the adjudication determination as a basis from which to negotiate a final resolution (as discussed further in Chapter 7.4.2); or

⁷⁸² As discussed in Chapters 2.7.2 and 2.7.3, the willingness of disputants to comply with decisions is affected by a party’s perception of procedural justice in the dispute resolution process.

⁷⁸³ Citing *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [46].

- the parties subsequently agreeing to accept the adjudicator's determination as a final binding resolution.

Whilst it may be argued that final resolution was never the intent of the legislation, this failure to provide a basis for a final settlement of the dispute represents at the very least a missed opportunity to reduce the huge costs of resolving disputes in the construction industry (as discussed in Chapter 3.1). This is in contrast to the more evaluative UK adjudication scheme which, as discussed in Chapter 6.10, encourages adjudication to be used as the basis for final settlement and appears to have resulted in a significant decrease in construction litigation.

7.6.2 Judicial Review of Adjudicators' Determinations for Errors of Law

In *Musico v Davenport*⁷⁸⁴ ('*Musico*'), the NSW Supreme Court considered for the first time whether an adjudicator's determination under the security of payment legislation could be challenged by judicial review. In *Musico*, the plaintiff employer applied to have the adjudicator's determination – that a progress payment of \$712,757 plus interest be paid to the contractor – quashed on, amongst other things, the basis that the adjudicator's determination was vitiated by several patent errors of law.

In his judgment, McDougall J held that the legislative intent of the Act⁷⁸⁵ was inconsistent with allowing judicial review on the basis of non-jurisdictional error of law. His Honour did, however, take the view⁷⁸⁶ that judicial review was available on jurisdictional grounds,⁷⁸⁷ which may include a jurisdictional error of law on the face of the record.⁷⁸⁸ In

⁷⁸⁴ [2003] NSWSC 977.

⁷⁸⁵ In this respect, his Honour specifically referred to s 25(4) of the NSW Act, which prohibits an adjudication respondent from challenging an adjudicator's determination in any proceedings initiated by the respondent to set aside an adjudicator's determination which has been filed by the claimant as a judgment for a debt in court.

⁷⁸⁶ Relying on *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 per Lord Reid at 171, as cited with apparent approval in relation to administrative tribunals in *Craig v The State of South Australia* (1995) 184 CLR 163.

⁷⁸⁷ For further discussion of judicial review on jurisdictional grounds, see Chapter 3.11.

⁷⁸⁸ In *Musico* at [66], McDougall J viewed that, in the context of adjudication, the record would include the adjudication application, any adjudication response, perhaps any further written submissions and comment thereon requested or permitted by the adjudicator and the determination itself. Subsequently, in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 at [91], Basten JA stated that the record will include both the determination and the reasons of the adjudicator.

reaching this conclusion, his Honour applied the same principle to adjudicators as did the High Court of Australia to administrative tribunals, on the basis that both lack power to authoritatively determine questions of law, in *Craig v The State of South Australia* ('*Craig*').⁷⁸⁹

an administrative tribunal [ie, one lacking judicial power] falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, *at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion*, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it. (emphasis supplied)

McDougall J found that some of the adjudicator's errors of law had led to the adjudicator failing to value the payment claim in accordance with the relevant provisions of the contract as required by the Act.⁷⁹⁰ As such, the court found that jurisdictional error of law had occurred as the adjudicator had failed to carry out the task that the Act requires to be carried out in the manner that the Act requires.⁷⁹¹ Accordingly, the Court quashed the adjudicator's determination by granting an order in the nature of certiorari⁷⁹² under its supervisory jurisdiction.⁷⁹³ Whilst *Musico* clarified the courts' position as to judicial review, it did not provide statutory adjudication with the judicial support it needed in order to gain the confidence, and usage, of claimants in the construction industry. *Musico* was applied in several subsequent cases⁷⁹⁴ in order to quash adjudicators' determinations until the NSW Court of Appeal handed down its decision in *Brodyn Pty Ltd v Davenport*⁷⁹⁵ ('*Brodyn*').

In *Brodyn*, the plaintiff head contractor made an application to have the adjudicator's determination – that the claimant subcontractor should be awarded an amount of \$180,059

⁷⁸⁹ (1995) 184 CLR 163.

⁷⁹⁰ See NSW Act, ss 9(a) and 10(1)(a).

⁷⁹¹ *Musico v Davenport* [2003] NSWSC 977 at [119].

⁷⁹² As discussed in Chapter 3.11.

⁷⁹³ See *Supreme Court Act 1970* (NSW), s 69.

⁷⁹⁴ For example, see *Abacus Funds Management v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, and *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116.

⁷⁹⁵ [2004] NSWCA 394.

– quashed by way of certiorari. The application was made on the basis of, amongst other things, an error of law in that the relevant payment claim was invalid due to it being one of several payment claims made after the termination of the construction contract, when only one such payment claim should be permitted under the contractual provisions. Disagreeing with *Musico*, the court found that relief in the nature of certiorari was not available to quash an adjudicator’s determination in relation to jurisdictional error.⁷⁹⁶ Hodgson JA considered that:

the availability of certiorari ... would not accord with the legislative intention disclosed in the Act that these provisional determinations be made and given effect to with minimum delay and minimum court involvement;⁷⁹⁷

Given the legislative intent, his Honour viewed that the jurisdictional error approach ‘cast the [judicial review] net too widely.’⁷⁹⁸ Instead, Hodgson JA preferred an approach where the court asks whether a requirement being considered by an adjudicator was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination. As such, Hodgson J laid down five basic and essential requirements of the Act, which he stated ‘may not be exhaustive’, for the existence of a valid adjudicator’s determination:⁷⁹⁹

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (s.22(3)(a)).

⁷⁹⁶ *Brodyn* at [58] - [59].

⁷⁹⁷ *Brodyn* per Hodgson JA at [58].

⁷⁹⁸ *Brodyn* at [54].

⁷⁹⁹ *Brodyn* at [53]. The section numbers shown in brackets refer to the relevant sections of the NSW Act.

If any of these requirements were not satisfied then, according to Hodgson JA,⁸⁰⁰ the purported determination would be void as it will not in truth be an adjudicator's determination within the meaning of the Act. Thus, relief would be available by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

In the wake of *Brodyn* there were many attempts to challenge adjudicators' determinations on the basis of failing to satisfy the basic and essential requirements set down by Hodgson JA, including those made on the following bases:

- the non-existence of a construction contract as defined by the Act;⁸⁰¹
- failing to serve a payment claim on the correct party,⁸⁰² and
- the payment claim not being served in accordance with the reference date.⁸⁰³

Importantly, Hodgson JA determined that errors of law on the face of the record *per se*, of the type argued in *Musico* and *Brodyn*, did not vitiate an adjudicator's determination as they were 'more detailed requirements' of the Act with which 'the legislature did not intend that exact compliance.'⁸⁰⁴ As his Honour subsequently stated in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*:⁸⁰⁵

In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of

⁸⁰⁰ *Brodyn* at [52].

⁸⁰¹ See, for example, *Levadetes Pty Limited v Iberian Artisans Pty Limited* [2009] NSWSC 641; *Cardiacos v Cooper Consulting & Construction Services (Aust) Pty Ltd* [2009] NSWSC 938; *McFadden v Turnbull* [2011] NSWSC 1294.

⁸⁰² See, for example, *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd* [2010] NSWSC 319.

⁸⁰³ See, for example, *Rubana Holdings Pty Limited v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405; *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1.

⁸⁰⁴ *Brodyn* at [55].

⁸⁰⁵ [2005] NSWCA 142 per Hodgson JA at [49].

s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid.

In *John Holland Pty Limited v. Roads & Traffic Authority of New South Wales*,⁸⁰⁶ Hodgson JA further considered that:

I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission.

Although, notably, in *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd*,⁸⁰⁷ the Supreme Court of Queensland set aside an adjudication determination for almost \$87 million where the adjudicator had omitted to consider submissions duly made by the respondent which were of considerable significance. Lyons J found that, ‘failure to consider submissions which are of such significance constitutes a failure by the second respondent to comply with an essential requirement of the BCIP Act for a valid decision.’⁸⁰⁸

Post *Brodyn*, adjudicators’ errors with respect to:

- deciding whether a payment claim identifies the construction work or related goods and services to which the payment relates,⁸⁰⁹
- making a determination on the basis of claim submissions with the adjudication application which differed from the payment claim initially served on the respondent,⁸¹⁰
- whether the reasons stated in a payment schedule together with duly made submissions can be considered,⁸¹¹ and

⁸⁰⁶ [2007] NSWCA 19 at [55].

⁸⁰⁷ [2011] QSC 29.

⁸⁰⁸ *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 29 at [123].

⁸⁰⁹ See eg *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238; (2006) 67 NSWLR 9 per Basten JA at [71].

⁸¹⁰ See eg *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors* [2007] NSWCA 49.

⁸¹¹ See eg *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd & Anor* [2009] NSWCA 157.

- the scope of the payment claim⁸¹²

have been treated as matters for the adjudicator to determine and, therefore, do not invalidate a determination as long as the adjudicator was making a *bona fide* attempt to comply with his or her obligations under the Act. In other words, such errors did not constitute a failure in a basic and essential requirement for a determination as set out in *Brodyn*.

In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*⁸¹³ (*'Chase'*), the claimant gave notice of its intention to apply for adjudication of the payment claim outside of the 20 business day period required by s 17(2)(a) the NSW Act. The adjudicator erroneously concluded that the notice had been given in a timely manner, and made a determination that the claimant was entitled to payment of the claimed amount plus interest. The respondent to the adjudication initiated an action in the NSW Supreme Court to have the adjudicator's determination quashed on the basis of jurisdictional error, despite the Court of Appeal's finding in *Brodyn* that compliance with the more detailed requirements of s 17 (amongst others) was not essential to a valid determination.⁸¹⁴ The NSW Supreme Court referred the case to the NSW Court of Appeal, which would not be bound by *Brodyn*.

The NSW Court of Appeal held that non-compliance with the notice provision under s 17(2)(a) of the NSW Act did amount to jurisdictional error. In doing so, the court reversed its position in *Brodyn*, finding that the Supreme Court does have the power to grant relief in the nature of certiorari to quash an adjudicator's determination. In reaching this decision, the court relied on the approach taken by the High Court of Australia in *Kirk v Industrial Court of New South Wales*⁸¹⁵ (*'Kirk'*), 'that it was beyond the legislative power of a State to take away from that State's Supreme Court its supervisory power to grant relief for jurisdictional error.'⁸¹⁶

⁸¹² See eg *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd & Anor* [2009] NSWSC 61; *John Holland Pty Limited v Roads & Traffic Authority of New South Wales & Ors* [2007] NSWCA 19; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229;

⁸¹³ [2010] NSWCA 190.

⁸¹⁴ *Brodyn* at [54]. See, also, *JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737 at [46].

⁸¹⁵ (2010) 239 CLR 531.

⁸¹⁶ *Chase* at [154].

Whilst reinstating jurisdictional error as the basis for judicial review of adjudicators' determinations, the court did not, beyond its immediate consideration of s 17(2)(a), list, or provide any 'rigid taxonomy',⁸¹⁷ as to the types of matters which might be considered jurisdictional error in relation to the Act. McDougall J did, however, consider that failure to satisfy the basic and essential requirements identified in *Brodyn* might also be characterised as jurisdictional error.⁸¹⁸

As Matthew Bell (2011: 37) states, following *Chase*:

At a practical level ... the immediate question ... [was] whether the decision will open up substantial opportunities for disgruntled parties to challenge adjudication determinations which did not already exist prior to the decision being handed down.

Matthew Bell (2011: 42) notes, however, Spiegelman CJ for one seems not to have expected the 'floodgates to open':

As Hodgson JA recognised in *Brodyn*, the purpose of the legislative scheme is best served by restricting the scope of intervention by the Courts. I do not believe that there will be frequent occasion for such interference – perhaps after a transitional period – once it is realised in the building industry that punctilious compliance with each specific time limit is required if a builder is to have the benefit of the scheme established by the Act.⁸¹⁹

Following *Chase*, the NSW Supreme Court has set aside adjudicators' determinations on the basis of jurisdictional error in the following circumstances:

- where an adjudicator failed to perform the statutory function⁸²⁰ of giving a sufficient statement of reasons with his determination,⁸²¹

⁸¹⁷In *Chase* at [159], McDougall J noted that in *Kirk* the majority emphasised 'that the reasoning in *Craig* ... is not to be seen as providing a rigid taxonomy of jurisdictional error', and 'not to be taken as marking the boundaries of the relevant field.'

⁸¹⁸*Chase* at [154]. Relying on the NSW Court of Appeal's concession, in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [71], that the description of basic and essential requirements as essential pre-conditions for the existence of an adjudicator's determination reflected the concept of jurisdictional error under the general law. Subsequently, in *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [41], McDougall J confirmed that the basis and essential requirements in *Brodyn* may now be accepted as jurisdictional.

⁸¹⁹*Chase* at [55].

⁸²⁰Under NSW Act, s 22(3)(b).

- where the court found that the adjudicator had erred in deciding that a payment claim had been properly made in accordance with the Act;⁸²² and
- where the claimant gave notice of intention to apply for adjudication before it was permitted to do so under the NSW Act.⁸²³

In *Owners Strata Plan 61172 v Stratabuild Ltd* ('*Stratabuild*'),⁸²⁴ the adjudicator decided not to consider in his determination an expert witness report submitted by the respondent with its adjudication response. On the basis that the NSW Act clearly prohibits additional reasons but not additional submissions in the adjudication response, the court held that the adjudicator had made a jurisdictional error of law and quashed the adjudicator's determination.⁸²⁵

In *Clyde Bergemann v Varley Power*⁸²⁶ ('*Varley*'), the court had to decide whether an adjudicator acted in excess of jurisdiction by determining that an applicant was entitled to a progress payment that exceeded the amount calculated in accordance with the terms of the contract (ie, non-compliance with s 9(a) of the NSW Act). McDougall J held that the adjudicator did not fall into jurisdictional error by failing to correctly apply the relevant contractual provisions with respect to the calculation of the progress payment amount.

In reaching his decision, McDougall J believed there was a marked contrast between failures to meet the requirements of s 9(a) and s 17(2)(a) of the NSW Act, which had been identified as jurisdictional in *Chase*.⁸²⁷ His Honour noted that, 'the jurisdictional requirements so far identified are, for the most part, anterior to the process of adjudication.'⁸²⁸ Further, he relied on Spigelman CJ's distinction in *Chase*⁸²⁹ between 'a

⁸²¹ *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359.

⁸²² *Steel v Beks* [2010] NSWSC 1404.

⁸²³ *Jantom Construction Pty Ltd v S&V Quality Interiors (NSW) Pty Ltd* [2011] NSWSC 670.

⁸²⁴ [2011] NSWSC 1000.

⁸²⁵ *Owners Strata Plan 61172 v Stratabuild Ltd* [2011] NSWSC 1000 at [40].

⁸²⁶ [2011] NSWSC 1039.

⁸²⁷ *Varley* at [41].

⁸²⁸ *Varley* at [41].

⁸²⁹ At [43].

fact to be adjudicated upon in the course of enquiry’ and ‘an essential preliminary to the decision making process.’⁸³⁰

His Honour considered that s 9(a) concerned the former, and agreed with Palmer J’s finding in *Multiplex Constructions Pty Ltd v Luikens*,⁸³¹ that:

If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.

As such, McDougall J viewed s 9(a) not to be a condition of jurisdiction, but rather a ‘description of the mechanical aspects of the essential task to be performed in the exercise of the jurisdiction that is conferred.’⁸³² His Honour added, ‘it would be most unusual for a mechanical provision such as s 9 to be characterised as jurisdictional.’⁸³³

Following *Chase*, there now exists some uncertainty as to the enforceability of adjudicators’ determinations which contain errors of fact or law. Under *Brodyn* the court would generally not interfere with an adjudicator’s decision on compliance with time limitations for adjudication proceedings.⁸³⁴ However, *Chase* and subsequent judgments, discussed above, appear to have now expanded the grounds for setting aside adjudicators’ determinations in NSW beyond *Brodyn*’s basic and essential requirements to at least include erroneous decisions of adjudicators as to whether payment claims and adjudication applications have been duly served in accordance with the NSW Act. Additionally, *Stratabuild* indicates that where an adjudicator erroneously decides not to consider submissions which he or she is required to under the NSW Act in making their determination, the adjudication determination will be quashed. *Varley*, however, indicates that, as long as the adjudicator has considered the matters he or she is required to consider under the NSW Act under s 22(2), the NSW Supreme Court is unwilling to extend the

⁸³⁰ *Varley* at [42]. His Honour explained that: ‘In this context “preliminary” means not so much chronologically as legally antecedent to the decision making process.’

⁸³¹ [2003] NSWSC 1140 at [58].

⁸³² *Varley* at [52].

⁸³³ *Varley* at [52].

⁸³⁴ *Agusta Industries v Niclad Constructions* [2010] NSWSC 925; *Reed v Eire* [2009] NSWSC 678.

grounds for review to include adjudicator's errors with respect to interpretation of those matters.

In Victoria, the Supreme Court, diverging from *Brodyn*, had already (pre-*Chase*) reached the conclusion in *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)*⁸³⁵ that, constitutionally,⁸³⁶ the Victorian Act could not be construed so as to 'limit the Court's jurisdiction by excluding or restricting judicial review by the Court, whether by certiorari or otherwise, of a determination of an adjudicator under the Act' (Vickery 2011: [61]).

Unlike NSW, Queensland has its own judicial review legislation in the form of the *Judicial Review Act 1991* (Queensland). Whilst this legislation originally covered adjudicators' determinations under the Queensland Act, and was used by some parties as the basis for an application for judicial review,⁸³⁷ it was amended in 2007⁸³⁸ to exclude adjudicators' determinations under s 18(2) of the Queensland Act.⁸³⁹ At the time, this had the effect of limiting reviews of adjudicators' determinations to the basic and essential requirements, listed above in *Brodyn*, available at common law. However, since *Chase*, the Queensland Court of Appeal has stated that the fact 'that adjudication decisions under the Payments Act are not reviewable under the JR Act does not mean that the court's supervisory jurisdiction over adjudicators has been removed.'⁸⁴⁰ Chesterman JA continued:

The situation appears thus to be that an adjudication decision may be impugned on the basis described in *Brodyn*, that essential statutory pre-conditions have not been complied with, and by application for a prerogative writ on the grounds of error of law on the face of the record or jurisdictional error or, presumably, any other ground recognised by pre JR Act jurisprudence.⁸⁴¹

⁸³⁵ [2009] VSC 426.

⁸³⁶ In accordance with the *Constitution Act 1975* (Vic).

⁸³⁷ For example, see *Bezzina Developers P/L v Deemah Stone (Qld) P/L* [2007] QSC 286, where a failure of an adjudicator to give work the same value as that previously determined by another adjudicator, in accordance with s 27(2) of the Queensland Act, was held to constitute a ground for judicial review under the *Judicial Review Act 1991* (Queensland).

⁸³⁸ By s 91 of the *Justice and Other Legislation Amendment Act 2007* (Queensland).

⁸³⁹ See *Judicial Review Act 1991* (Qld), Schedule 1.

⁸⁴⁰ *Northbuild Construction P/L v Central Interior Linings P/L and Ors* [2011] QCA 22 per Chesterman JA at [33].

⁸⁴¹ *Ibid* at [37].

Although, in the same judgment, his Honour seemingly qualified his statement as follows:

Chase Oyster Bar, which in turn decided that the court has jurisdiction to grant prerogative relief with respect to adjudications affected by error on the face of the record or jurisdictional error cannot be applied in Queensland, at least without additional analysis, because of the complication, not present in New South Wales, afforded by s 18(2) [of the *Judicial Review Act 1991* (Qld)] and the inclusion of the Payments Act in the Schedule.⁸⁴²

In WA, the Court of Appeal recently referred with approval to *Chase* in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*⁸⁴³ in finding that:

an adjudicator acting under s 31(2)(b) is exercising a statutory power or function capable of affecting the parties' rights, and would thereby ordinarily be amenable to the Supreme Court's supervisory jurisdiction ...⁸⁴⁴

The WA Court of Appeal considered that the four matters listed in s 31(2)(a) of the WA Act, as discussed in Chapter 6.7, 'are "jurisdictional facts" which condition the lawful exercise of the function committed to an appointed adjudicator.'⁸⁴⁵ As such, in WA, the prerogative writs of prohibition and certiorari would be available to challenge any adjudicator's determination which should have been dismissed under subpars (i) to (iv) of s 31(2)(a).

7.6.3 Judicial Review of Adjudicators' Determinations for Denials of Natural Justice and Lack of Good Faith

In addition to compliance with the basic and essential requirements he set out in *Brodyn*, Hodgson JA considered that in order for a determination to have the legally binding effect provided by the NSW Act, there must be:

⁸⁴² *Ibid* at [32].

⁸⁴³ [2011] WASCA 217.

⁸⁴⁴ *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 at [96].

⁸⁴⁵ *Ibid* at [115].

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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 this power ... and no substantial denial of the measure of natural justice that the Act requires to be given.⁸⁴⁶

His Honour did not elaborate as to what extent the rules of natural justice must be applied to adjudication determinations in order to satisfy the requirements of the Act.

There have, however, been several judgments which have considered whether parties have been denied natural justice during the adjudication process.⁸⁴⁷ From these cases, it now seems clear that a denial of natural justice will only be sufficient to render an adjudication determination void if 'the denial goes to an issue which is germane or material in the making of the adjudication' (McDougall 2009: 12). Furthermore, the denial of natural justice must be one which should not only be germane or material to, but actually affect the outcome of, the adjudicator's ultimate decision.⁸⁴⁸ The rationale for this, stemming from the judicial view regarding the avoidance of practical injustice⁸⁴⁹ (as discussed in Chapter 3.12.2), is explained by Justice McDougall (2009: 13) as follows:

To hold in such a case that the determination was void, as a denial of natural justice, where there should have been no difference to the outcome would not reflect the policy of the Act as it would lead to further, unnecessary delays in achieving an interim result.

Thus, for example, where an adjudicator failed to invite a party to put in a submission on an issue material to the adjudicator's reasoning, it was held not to be a denial of natural justice in the context of the NSW Act because the submissions that the respondent would have made, if given an opportunity, should not in the view of the court have persuaded the adjudicator to change his mind.⁸⁵⁰

⁸⁴⁶ *Brodyn* at [52].

⁸⁴⁷ For further discussion of the content of natural justice in statutory construction adjudication, see McDougall (2009).

⁸⁴⁸ *Richard Shorten & Anor v David Hurst Constuctions Pty Limited & Anor* [2008] NSWSC 546 at [23].

⁸⁴⁹ *Watpac Constructions v Austin Corp* [2010] NSWSC 168 at [146].

⁸⁵⁰ *Trysams Pty Limited v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399.

Further, the courts have found that consideration of the extent of natural justice required to be given must take into account the scheme of the Act.⁸⁵¹

As such, the courts have found that, amongst others, a substantial denial of natural justice occurs in the following circumstances:

- where the adjudicator fails to consider duly made submissions which he or she is required to consider by the Act in determining an adjudication application;⁸⁵²
- where the adjudicator's conduct created a reasonable apprehension of bias.⁸⁵³ Indeed, in *Reiby Street v Winterton*,⁸⁵⁴ Master Macready felt that it was appropriate 'that the principle relating to apprehended bias ... be applied with greater rigor in the context of adjudications under the act compared to judicial proceedings' as, unlike judges, adjudicators have neither been trained to be conscious of these matters nor have taken a judicial oath;
- where the adjudicator ignored the respondent's request to file further submissions on a new issue raised by the claimant in their further submissions to the adjudicator;⁸⁵⁵
- where the claimant had not provided a full adjudication application to the respondent;⁸⁵⁶ and
- where the parties are denied, or not offered, an opportunity by the adjudicator to make submissions on a point relevant to his or her determination.⁸⁵⁷

There have been several attempts by disgruntled respondents to argue that an adjudicator's determination is void on the basis that the adjudicator failed to exercise their powers under

⁸⁵¹ *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [58]; *Watpac Constructions v Austin Corp* [2010] NSWSC 168 at [142].

⁸⁵² *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818; *Lanskey v Noxequin* [2005] NSWSC 963.

⁸⁵³ *Allpro v Micos* [2010] NSWSC 453; *Reiby Street v Winterton* [2005] NSWSC 545.

⁸⁵⁴ [2005] NSWSC 545 at [28]-[29].

⁸⁵⁵ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors (No 2)* [2010] VSC 255.

⁸⁵⁶ *Shorten v David Hurst Construction Pty Ltd* [2008] NSWSC 546.

⁸⁵⁷ *St Hilliers Contracting Pty Limited v Dualcorp Civil Pty Ltd* [2010] NSWSC 1468; *Watpac Constructions v Austin Corp* [2010] NSWSC 168; *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205; *John Goss Projects v Leighton Contractors & Anor* [2006] NSWSC 798; *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6.

the Act in good faith. More specifically, these challenges have been made on the basis that the adjudicator has failed to arrive at their determination by properly considering the matters required by the legislation (as discussed in Chapter 6.7).⁸⁵⁸

In the context of adjudication, the courts have considered that good faith requires not just an honest attempt by an adjudicator to exercise their powers, but also a genuine or conscientious approach.⁸⁵⁹ As such, recklessness or capriciousness on the part of an adjudicator when performing their function, which falls short of a wilful and deliberate failure to attempt to perform the function, can amount to a want of good faith.⁸⁶⁰ Further, McDougall J found that ‘the obligation of good faith requires at least that adjudicators should turn their minds to, grapple with and form a view on all matters that they are required to “consider”’.⁸⁶¹

Additionally, as McDougall J has stated, ‘The extent of compliance with the good faith obligation is not to be assessed in a vacuum.’⁸⁶² It is necessary to make such assessment having regard to the statutory intent that adjudication applications be determined as expeditiously as possible,⁸⁶³ and to ‘take into account the magnitude of the task and the way that the parties have put the task before the adjudicator.’⁸⁶⁴

As such, the courts have found that, amongst others, the adjudicator failed to exercise their powers under the Act in good faith in the following circumstances:

- where the adjudicator failed to consider duly made submissions which he or she was required to consider by the Act in determining an adjudication application,⁸⁶⁵

⁸⁵⁸ See NSW Act, s 22(2).

⁸⁵⁹ *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd & Anor* [2005] NSWSC 1129 at [111].

⁸⁶⁰ *Ibid* at [110].

⁸⁶¹ *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering & Construction Pty Ltd* [2010] NSWSC 818 at [34].

⁸⁶² *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [83].

⁸⁶³ NSW Act, s 21(3).

⁸⁶⁴ *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [66] and [84].

⁸⁶⁵ *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818; *Lanskey v Noxequin* [2005] NSWSC 963.

- where the adjudicator failed to embark on any course of action to decide the extent and value of the work completed for himself, but rather adopted the claimant's assessment in preference to the respondent's payment schedule because the respondent had made some unmeritorious but unrelated submissions;⁸⁶⁶ and
- where the adjudicator, having not understood the nature of the dispute from the respondent's payment schedule, had not properly turned his mind to the submissions of both parties in an attempt to understand what the real dispute was.⁸⁶⁷

7.6.4 Issue Estoppel and Defences under Federal Legislation

Applications to a court for abuse of process have commonly occurred where a respondent submits that a payment claim, or part thereof, is invalid due to it containing claims for construction work and/or related goods and services which have already been determined in a previous claim. In such circumstances, the courts have generally held that the principles of res judicata and issue estoppel apply and, accordingly, have estopped claimants from bringing adjudication applications with respect to re-agitated claims.⁸⁶⁸

Respondents have found ways to circumvent the East Coast model's anti-suit provisions when a claimant is trying to enforce an adjudication determination (as discussed in Chapter 6.7) by raising set-offs or defences under Federal legislation such as the s 459 of the *Corporations Act 2001*⁸⁶⁹ and s 52 of the *Trade Practices Act 1974* [now s 18, Schedule 2 of the *Competition and Consumer Act 2010*].⁸⁷⁰

⁸⁶⁶ *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd & Anor* [2005] NSWSC 1129.

⁸⁶⁷ *Timwin Construction v Facade Innovations* [2005] NSWSC 548.

⁸⁶⁸ See *Urban Traders v Paul Michael* [2009] NSWSC 1072; *Watpac Constructions v Austin Corp* [2010] NSWSC 168; *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWSC 146; *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635. In Queensland, however, the Court of Appeal has held that it is possible to make a payment claim which is identical to a previous payment claim, upon the occurrence of a new reference date, in the circumstances where the adjudicator's determination in relation to the initial payment claim has been found to be void – see *Spankie v James Trowse Constructions Pty Ltd* [2010] QCA 355.

⁸⁶⁹ *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553; *Greenaways Australia Pty Ltd v Cbc Management Pty Ltd* [2004] NSWSC 1186; *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284.

⁸⁷⁰ *Bitannia Pty Ltd & v Parkline Constructions Pty Ltd* [2006] NSWCA 238; *Austruct Qld P/L v Independent Pub Group P/L* [2009] QSC 1.

7.7 Summary of Findings and the Need for Further Research

This chapter has reflected upon the practical manifestations of the East and West Coast model legislation, so far as the available data allows. The key observations from this data may be summarised as follows:

- generally, the number of adjudication applications under the East Coast legislation in NSW and Queensland is considerably higher than under the West Coast legislation in WA and NT;
- in particular, the amount of adjudication determinations for payment claims under \$100,000 is higher under the East Coast legislation in NSW and Queensland than under the West Coast legislation in WA;
- whilst adjudication fees are lower for payment claims less than \$25,000 in NSW and Queensland (under the East Coast legislation) than in WA (under the West Coast legislation), the converse is true for payment claims above \$100,000;
- the adjudication process generally takes 1 to 2 weeks longer under the West Coast as compared to the East Coast legislation;
- the operation of a separate statutory payment scheme under the East Coast legislation inevitably creates extra administrative tasks for the parties, particularly the respondent, above and beyond the contractual requirements;
- several deficiencies exist in terms of the procedural and distributive justice afforded by the East Coast model's adjudication process which do not exist, or at least not to the same extent, under the West Coast model; and
- a considerably larger number of judgments concerning the validity of adjudicators' determinations under the legislation have arisen from the courts under the East Coast legislation in NSW and Queensland than under the West Coast legislation in WA.

The differing manifestations of the East and West Coast models are stark, considering that both legislative vehicles have the common aim of accelerating cash flow in the industry via the use of rapid statutory adjudication of an interim binding nature. The differences can be attributed to the East Coast adjudication scheme being drafted primarily as an

independent certification process (as discussed in Chapter 6.3) in order to provide a ‘fast and easy way’ (Bell and Vella 2010: 581)⁸⁷¹ for smaller contractors and suppliers to get paid, as opposed to a dispute resolution process for contractual payments claims generally as per the West Coast scheme. Consequently, the East and West Coast legislation adopt different approaches to ‘issues representing deep fault lines within the landscape of construction practice’, which ‘include the dichotomies of freedom of contract as against protection of the vulnerable, and speed as against procedural fairness in dispute resolution’ (Matthew Bell 2011: 46).

Although the data available for review is limited, it is contended that there is enough evidence to substantiate the key observations that have been made, and to form the basis on which proposals could be developed for a new approach to the resolution of payment claims. Having said this, it would, of course, be useful for further research to be undertaken in order to inform the formulation, and subsequent refinement, of the details of any new model. With that in mind, the next two chapters explore possible options for harmonising and reconceptualising the existing State and Territory schemes.

⁸⁷¹ Citing the Victorian Building Commission (2007).

Chapter 8

The Case, and Proposals, for a National Approach

8.1 The Call for a National Approach

As long ago as February 2003, when the legislation had only commenced in NSW and Victoria, Commissioner Cole (2003: Vol 8, 255-262) recommended in the *Final report of the Royal Commission into the Building and Construction Industry* (the ‘Cole Report’) that there be a nationally consistent approach in relation to security of payment reform by way of a Commonwealth *Building and Construction Industry Security of Payments Act*. This recommendation was formed on the basis of widespread support having been expressed to the Royal Commission (Cole 2003: Vol 8, 255-256) for a consistent approach from industry bodies.⁸⁷²

Nine years on, no action has been taken on Cole’s recommendation for national consistency. This is, perhaps due to the primary political purpose of the Cole Royal Commission’s appointment being, as stated in the terms of reference (Cole 2003: Vol 2, 3), the investigation of the nature, extent and effect of any unlawful or otherwise inappropriate

- industrial or workplace practice or conduct; and
- practice or conduct relating to financial transactions undertaken by employee or employer organisations, and inappropriate management of industry funds for training, long service leave, redundancy or superannuation.

Indeed, the Commonwealth Government’s legislative response to the Cole Report was the *Building and Construction Industry Improvement Act 2005* (the ‘BCII Act’), which states that its main object is to provide an improved workplace relations framework for building work.⁸⁷³ In order to monitor and promote appropriate standards of conduct, and to

⁸⁷²Including the National Electrical and Communications Association; Housing Industry Association Limited; Civil Contractors Federation; Australian Industry Group; Air Conditioning and Mechanical Contractors’ Association of Victoria Limited; Association of Consulting Engineers Australia.

⁸⁷³ *BCCI Act*, s 3(1).

investigate suspected contraventions of workplace laws by building industry participants, the *BCCI Act* established the role of Australian Building and Construction Commissioner.⁸⁷⁴

Eight separate and differing Acts for the adjudication of payment claims now exist in Australia. As seen from the comparative review of the legislation presented in Chapter 6, the differences between the Acts are manifold.

Bell and Vella (2010: 576) observe that:

It seems to be a truth universally acknowledged that the current level of inconsistency across State borders is a matter which ought to be addressed on an urgent basis. At the same time, there is a palpable sense of incredulity by observers that consistency has not been able to be achieved already.

Jacobs (2007: 16) comments:

It must be a matter of considerable confusion to practitioners advising clients who have projects in more than one State/ Territory where there is so little uniformity in the comparative legislation ... The sooner there is uniform legislation in a relatively small country such as Australia, the better for the construction industry.

Fenwick Elliot (2007: 6) bluntly describes the current state of affairs with respect to the Australian legislation as ‘palpably absurd’ due to it being ‘hard to see any relevant distinguishing feature between the commercial and legal landscapes of different common law countries around the world, let alone different States within Australia.’

In the wake of Commissioner Cole’s recommendation, and particularly since the advent of all Australian jurisdictions having passed the legislation at the end of 2009, there have been ‘increasing calls ... to forge a uniform national approach to security of payment regulation’ (Coggins, Fenwick Elliott and Bell 2010: 20).⁸⁷⁵ These are epitomised by the Honourable Justice Peter Vickery’s (2011: [8]) recent invocation to take action on the matter:

⁸⁷⁴Although, the *Fair Work (Building Industry) Act 2012*, the role of ABC Commissioner has been abolished and replaced with the Director of the Fair Work Building Industry Inspectorate.

⁸⁷⁵ Citing Bailey (2009); Zhang (2009); Bell and Vella (2010).

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.

Zhang (2009: 393-394) contends that, as well as there now being ‘a wealth of experience and familiarity [with the legislation] sufficient for collaboration on a federal level’, the timing is right for national intervention because by improving the cash flow of industry participants ‘security of payment legislation can act as a buffer in downturns to lessen the harsh impact.’ She also considers that it can also be an accelerant in times of investment in the construction industry (for example, through government stimulus packages) to further stimulate revival.

This chapter will start by discussing the benefits and disadvantages of a national approach to the legislation. Having presented the case for harmonisation, it will then consider the logistics of how national legislative uniformity may be achieved in Australia. Finally, an overview of three existing proposals for national uniformity is given.

8.2 The Benefits of a Nationally Unified Approach

The argument for uniform security of payment legislation is compelling in terms of cost benefits to the construction industry. Cole (2003: Vol 8, 255) believes that national consistency ‘is important because it reduces the cost of businesses moving between jurisdictions and operating in different jurisdictions.’ In her well-considered and detailed article on why national security of payment legislation is required in Australia, Zhang (2009) reiterates Cole’s belief and further adds that:⁸⁷⁶

national consistency is important because it reduces ... the risk premiums levied by subcontractors when it is perceived that they are receiving less legal protection. The benefits of a national scheme will outweigh the costs involved in the transfer because a federal system will be able to better align the vehicle of delivery with the objectives.

Zhang (2009: 390-393) identifies the following benefits: accessibility, centralising the knowledge bank, ease of operation, consistency on freedom of contract, and consistency

⁸⁷⁶Citing Risgalla and Smithies (2008); Fisher (2005).

on procedures. To this list of benefits may be added consistency on payment rights (Cole 2003: Vol 8, 255).

8.2.1 Accessibility

Zhang (2009: 391) highlights that there has been a problem at State level with awareness of the legislation, particularly amongst contractors and subcontractors whom the legislation is aimed at helping. As evidence of this, she points to the research study carried out by Brand and Uher (2008; 2010), which surveyed the members of two peak NSW trade associations. They found that after seven years of operation, still almost half of the contractors and subcontractors surveyed admitted to having either low or no knowledge of the NSW Act.

Zhang (2009: 391) argues that:

By introducing a national scheme, there will be more public awareness and clarity on the regulatory system. This has the potential to increase usage of the Act and benefit those who need it most.

8.2.2 Centralising the Knowledge Bank

Zhang (2009: 391) states that:

Implementing one legislative framework will facilitate knowledge sharing between jurisdictions and result in better clarification of the issues that arise in the legislation. A more detailed consultation process will be taken for reviews, which will bring about more effective reforms. 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.

As well as speeding up the development of the common law, under one piece of legislation judicial interpretation of statutory provisions will also be more consistent than under the present situation, where ‘there are many uncertainties surrounding the interpretation of provisions, and similar sections in one jurisdiction may not be interpreted likewise in another’ (Zhang 2009: 392).

8.2.3 Ease of Operation

In their submission to Cole (2003: Vol 8, 255) the Civil Contractors Federation highlight that operational difficulties would arise from inconsistent legislation

due to the transient nature of the contractors and suppliers in the industry who often work across a number of states and ... the need for them to keep up with 8 different state or territory legislation requirements which are often changing.

In order to demonstrate the mobile nature of the industry, Zhang (2009: 391) refers to the fact that in 2008/2009 the largest ten commercial construction companies, who collectively won in the order of \$27 billion worth of contracts, were all multi-jurisdictional. She concludes that 'shifting to a uniform scheme will significantly impact the ease of operation for the commercial construction industry' (Zhang 2009: 392).

8.2.4 Consistency on Freedom of Contract

The differences in approach to freedom of contract between the East and West Coast models (as discussed in Chapter 6.11) mean that the legislation impacts differently upon certain standard form contractual clauses in East and West Coast jurisdictions (Zhang 2009: 392). In particular, the combination of the separate statutory payment system and the 'no contracting out' provision under the East Coast model (as discussed in Chapter 6.9) means that it has far greater potential to override freely agreed contractual clauses than does the West Coast model, which attempts to enforce the contractually agreed payment provisions.

The current inconsistencies in the legislation mean that certain standard form contractual clauses may hold up in one jurisdiction (or some jurisdictions) but not others (Zhang 2009: 392). This creates confusion for contracting parties as to the business risks to which they are agreeing. In their submission to Cole (2003: Vol 8, 255-256), the National Electrical and Communications Association sum up the problem from the contractor's perspective:

The understanding of conditions of contract is difficult and having different provisions in each State only adds to the complexity in contract documents. Contractors are best at what they do and should not have to be troubled attempting to understand the multitude of clauses presented to them by

different contractors let alone in different locations in the country all with differing laws ... With each State legislating differently it would detract from having nationally acceptable Standards.

8.2.5 Consistency on Procedures

As may be seen from the review of the payment systems and adjudication schemes presented in Chapter 6.5, there are several inconsistencies between the various Acts with respect to procedure. Perhaps the starkest procedural difference between the East and West Coast models is the strict payment schedule provision in the East Coast but not West Coast model Acts. Another example is the differences in time limits provided by the various Acts for key events such as the bringing of an adjudication application, the serving of payment schedules, and the lodging of an adjudication response. These procedural inconsistencies are not only very confusing, but have potentially ‘dire consequences’ if mixed up (Zhang 2009: 392).⁸⁷⁷

In their submission to Commissioner Cole (2003: Vol 8, 255), the Housing Industry Association express that:

Lack of national uniformity, at least in the basic principles and practical steps to effect recovery of money owed, will lead to confusion, increase transaction costs and militate against full and effective use of the legislation.

8.2.6 Consistency on Payment Rights

National consistency would ensure that contractors throughout Australia are treated equally with respect to payment rights. Cole (2003: Vol 8, 255) states:

from the standpoint of principle it is not obvious why subcontractors in one State or Territory should have better prospects of receiving payment for their work than subcontractors working in any other State or Territory.

Although Cole made his comment at a time when there seemed to be ‘no realistic prospect of legislation being enacted in either South Australia or Tasmania’ (Cole 2003: Vol 8, 257), it still holds true in the current context with respect to the differing scope of payment

⁸⁷⁷ As an example, Zhang (2009: 392) states: ‘a respondent who fails to submit a payment schedule in response will become liable for the entire claimed amount under the East Coast model.’

claims between the various Acts (as discussed in Chapter 6.4). For example, a contractor working for a residential occupier will have a better prospect of receiving payment in WA, NT and Tasmania than in the other jurisdictions. Further, the differing approach of the Acts with respect to allowing amounts for variations and damages under the contract in payment claims means that the payment rights of contractors will differ between jurisdictions.

As well as being important in principle, Cole (2003: Vol 8, 255) points out that consistency on payment rights would mean 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.’

8.3 The Disadvantages of a Nationally Unified Approach

Zhang (2009: 389) proposes that, ‘The economic and political strength of the larger East Coast States may sideline the concerns of smaller jurisdictions and result in the loss of legislative developments elsewhere.’ As an example of this, Zhang (2009: 390) refers to Tasmania’s acquiescence in adopting the East Coast model, due to the likelihood of significant disadvantages occurring if it did not,⁸⁷⁸ despite its submission to the Cole Royal Commission that:

It is doubtful that any additional benefit would be realized from a uniform approach to the problem of security of payments for subcontractors. Any problems in this area are best addressed by each jurisdiction, as solutions will vary [sic] depending upon the extent of the problem and the size of the market. (Cole 2003: Vol 8, 256)

Bell and Vella (2010: 566) comment that Tasmania’s concern with respect to national uniformity ‘appears, from the enactment of the Tasmanian Act, now to have been sublimated to an overriding desire not to be out of step with the rest of the country.’

Zhang (2009: 390) also considers that:

The West Coast jurisdictions may also be disadvantaged, given they take up a smaller proportion of national construction volume. The West coast may struggle to accept an East coast framework

⁸⁷⁸ Citing Stenning and Associates (2006: 29-30).

considering that very different views prevail on the extent to which the Act should impose on the contractual ability of parties to bargain.

8.4 The Options for Achieving National Uniformity

With such ‘appallingly inconsistent’ (Bailey 2009: 1) legislation having developed at State and Territory level, there is now seems to be almost universal agreement from commentators that federal legislation is necessary in order to achieve national consistency (Cole 2003: Vol 8, 253; Bell and Vella 2010: 577; Zhang 2009: 393).

However, the multitudinous and significant inconsistencies between the legislation make the prospect of any short to medium term harmonisation by the States and Territories seem to be highly unlikely. Cole (2003: Vol 8, 257) notes that six years of active effort to achieve security of payment harmonisation at a State and Territory level by the Australian Procurement and Construction Council failed to deliver such an approach.

Further obstacles to State and Territory level harmonisation have been identified as follows:

- there is competition between the various vested interests in each jurisdiction as to the shape and form of any security of payment legislation that will be introduced (Davenport 2006: 21);
- the jurisdictions have competed among themselves to draft the best legislation (Zhang 2009: 393); and
- the achievement of national uniformity at a State and Territory level is complicated by the need, in order to seek uniformity within the existing structure, for engagement with the processes of the Standing Committee of Attorneys-General [now the Standing Council on Law and Justice] and the Council of Australian Governments, both of which are organisations facing the perennial challenge of a full agenda yet limited time. Moreover, the stakeholders of those bodies, the State and Territory governments, are elected to represent the people and interests of those States and Territories, not those of the Australian nation. (Bell and Vella 2010: 576-577)

Bell and Vella (2010: 577) conclude that the achievement of unified legislation

would, on its face, require a significant shift away from the traditional assumption that security of payment legislation falls within the inherent power of the State legislatures towards recognition that it more naturally sits within one of the Commonwealth's referred heads of power.

Substantiating the case for such a shift, Bell and Vella (2010: 577) argue that 'the natural home of security of payment legislation may well be regarded as being within Commonwealth legislation' because:

- 'such a shift arguably represents an opportunity to deliver upon the explicit intent of the State legislatures ... to undertake root and branch reform of behaviour within the construction industry'; and
- 'the Commonwealth is the only level of government which can legislate comprehensively in relation to insolvency, the risk of which remains a key driver of security of payment reform.'

Any proposal for federal legislation, however, has to consider how the limitations on the Commonwealth's power under the *Australian Constitution* will affect its operation. Under the *Constitution*, the scope of a Commonwealth Act could extend to contracts:

- where at least one of the parties is a foreign corporation, or trading or financial corporation formed within the limits of the Commonwealth (ie, a 'constitutional corporation');⁸⁷⁹
- between businesses in different countries, or in different Australian States;⁸⁸⁰
- in any Australian Territory (ie, ACT and NT),⁸⁸¹
- with Commonwealth Government Agencies, such as Australia Post;⁸⁸²
- covered by legislation which gives effect to an International treaty,⁸⁸³ and

⁸⁷⁹ *Australian Constitution*, s 51(xx).

⁸⁸⁰ *Australian Constitution*, s 51(i).

⁸⁸¹ *Australian Constitution*, s 122.

⁸⁸² *Australian Constitution*, s 51(v).

⁸⁸³ *Australian Constitution*, s 51(xxix), which allows the Commonwealth Parliament to make laws for external affairs.

- concerning matters referred by any State, or States, to the Parliament of the Commonwealth, but only extending to those States by whose Parliaments the matter is referred, or which afterwards adopts the law.⁸⁸⁴

With respect to the final point above, referral by the States could be either on the basis of a broader subject-based referral or narrower text-based referral. Under a text-based referral, the State Parliaments have an opportunity to consider the exact wording of the Commonwealth Bill whereas, under a subject-based referral, they do not.

This means that, in the absence of a relevant treaty or a referral of powers from the States, the only class of contracts that could not be covered by federal legislation is that of contracts between two unincorporated businesses in the same State. As the amount of contracts falling within this class in the construction industry is likely to be very small, the Commonwealth Parliament does not need the support of the States in order to largely harmonise security of payment legislation. As Cole (2003: Vol 8, 260) states:

As head contractors and large subcontractors are almost invariably incorporated, at least in the commercial sector, Commonwealth legislation could cover the vast majority of relevant relationships in that sector. While not all disputes over security of payment involve a constitutional corporation, most do.

However, the enactment of overriding federal legislation, without State support would likely prove to be politically unpopular and cause discontent among the States. Such discontent was, indeed, evident in the State of Queensland's vehement objection to the Cole Royal Commission's proposal for federal legislation (as discussed further in Chapter 8.5.1) that, 'As a matter of principle, it is not open to the federal Parliament to sit in judgment on the manner in which a sovereign State goes about its business as expressed by its legislation' (Cole 2003: Vol 8, 261).

With State support, the legislation could be fully harmonised by one of the following options:

⁸⁸⁴ *Australian Constitution*, s 51(xxxviii).

- (i) Commonwealth legislation ‘enacted under the [Commonwealth’s] corporations power,⁸⁸⁵ and then mirrored at State level to extend its application’ (Zhang 2009: 393) to non-corporations in a similar structure to trades practices legislation in Australia;⁸⁸⁶
- (ii) a subject-based or text-based referral of legislative power by all of the States to the Commonwealth Parliament to enable the enactment of a single Commonwealth Act; or
- (iii) the States and Territories harmonising their own legislation, with no federal legislation enacted.

Due to the obstacles discussed above, there does not appear to be much optimism that harmonisation can be achieved at a State and Territory level. The Royal Commission into the Building and Construction Industry (2002: 21) considered that, at the time, both the mirror legislation and referral options were ‘unlikely to occur.’⁸⁸⁷ Further, Bell and Vella (2010: 577) consider that the ‘prospects of the States and Territories conceding that the law-making power in such a critical area rests with the Commonwealth may seem remote.’

Nevertheless, according to Bell and Vella (2010: 578), there appears to be a sentiment amongst commentators that:

The time seems ripe for re-consideration of whether, as Commissioner Cole proposed back in 2003, the next generation of security of payment legislation should be by way of a unified Act emanating from the Federal Parliament.

According to Zhang (2009: 376):

Cash flow in the construction industry can only be adequately addressed on a national scale because the issue requires conformity and co-operation between jurisdictions. Separate schemes may avoid the political tension that would arise in pursuing a common solution, but this has come to the detriment of the overall effectiveness of security of payment. The States, Territories and federal

⁸⁸⁵ *Australian Constitution*, s 51(xx).

⁸⁸⁶ Whereby federal legislation was enacted in the form of the then *Trade Practices Act 1974* (now the *Australian Consumer Law*) and mirrored in Fair Trading Acts at State level.

⁸⁸⁷ Although at the time, as noted in Chapter 8.3, the State of Tasmania expressed in their submission to Cole that it did not support national uniformity, which now appears not to be the case. Furthermore, at the time, both Tasmania and SA were not considering introducing security of payment legislation, whereas now they have.

government need to confront their constitutional and political difficulties in power-sharing and bring the vehicle of delivery in line with the espoused objectives.

On 6 March 2012, the Australian Prime Minister, Julia Gillard, announced that a new Business Advisory Forum has been established that will be able to nominate new areas of regulatory reform that will help lift productivity and drive investment. This perhaps gives renewed cause for hope that security of payment legislation reform may yet make it on to the Council of Australian Governments' (COAG) agenda. The new Business Advisory Forum includes 25 business representatives, and will meet with the members of COAG the day before COAG meetings (Tingle 2012).

8.5 Proposals for Harmonisation

In addition to Cole's detailed proposal for national harmonisation in the form of his draft *Building and Construction Industry Security of Payments Bill 2003* (Commonwealth), two other proposals for national harmonisation have been proffered, one by Davenport (2007) and another by Bailey (2009), albeit in conceptual rather than detailed form. This section presents an overview of each of these three existing proposals.

8.5.1 Cole's Draft Commonwealth *Building and Construction Industry Security of Payments Bill 2003*

In an attempt to encourage and achieve harmonisation in the short to medium term, Cole (2003: 260) recommended enacting Commonwealth security of payment legislation which 'in order to promote harmonisation ... could, by regulation, exempt States or Territories from the Commonwealth legislation if they enacted legislation consistent with the Commonwealth regime.' As part of his recommendation, Cole (2003: Vol 8, Appendix 1) even went as far as drafting a *Building and Construction Industry Security of Payments Bill 2003* for enactment.

Cole (2003: Vol 8, 261) considered that his proposal would

not unacceptably undermine national consistency, because the draft [Commonwealth] Bill would create a consistent baseline standard. States and Territories would, however, remain free to experiment with and improve their own security of payment legislation provided that they remained above the baseline set by the draft Bill.

Cole's draft Bill⁸⁸⁸ is based heavily upon the draft legislation at the time in Queensland and Western Australia (Cole 2003: Vol 8, 258). It, therefore, draws upon both the East and West Coast models.

Like the East and West Coast models, Cole's Bill applies to contracts for supply of goods related to construction work, contracts for professional services related to construction work, and oral contracts as well as written contracts.

The definition of construction work under Cole's Bill is broadly similar to that of the East and West Coast models (as discussed in Chapter 6.4). Like the East Coast model, it does not exclude construction, restoration or alteration of wholly artistic work and watercraft. Like the West Coast model, it does exclude the construction of facilities for the purpose of extracting oil or minerals.

Like the West Coast model, Cole's Bill covers payment claims made under the provisions of a construction contract generally, and is not limited to just progress payments as is the East Coast model. As such, either contractual party has the right to make an adjudication application when a payment claim is rejected, disputed or not paid in full by the due date for payment.

Notably, Cole chose to follow the West Coast model with respect to preserving the parties' freedom of contract by not providing a separate statutory East Coast style payment system. According to Cole (2003: Vol 8, 264):

The QBSA [Queensland Building Services Authority] proposal is more prescriptive specifying mandatory contract clauses. The Western Australian proposal specifies the issues to be addressed in the contract but not how they will be addressed. This is more flexible and recognises the scope and diversity in the industry.

In a similar fashion to the West Coast model, contractual provisions that allow payment to be made later than 35 days (50 days under the West Coast model) after the submission of a payment claim are unlawful.

⁸⁸⁸ See Cole (2003: Vol 8, Appendix 1) for a full version of the draft Bill.

Like the West Coast model, Cole's Bill provides default provisions with respect to payment procedure which apply if a contract is silent on the matter. Amongst other things, the default provisions provide that: payment claims may be submitted at any time after commencement of the contract works and at intervals of not less than 20 days from the date of any previous payment claim. Within 10 days of receipt of a payment claim, a party must either pay the claim in full or notify the claimant as to the reasons for rejecting all or any part of the claim, and pay any undisputed amount.

Due to there being no separate statutory payment system, Cole's Bill does not require payment claims to be endorsed as being made under the Act and does not have strict statutory provisions with respect to the serving of a payment schedule by a respondent as does the East Coast model. Perhaps because of this, like the West Coast model, Cole's proposed Bill does not exclude home owners from its operation.

In the absence of the East Coast style separate statutory payment system with strict payment schedule provisions, Cole's Bill does not provide a statutory right for a claimant to seek summary judgment in court for an unpaid payment claim. Nor does it allow a claimant the right to suspend works in the event that any undisputed amounts of a payment claim are not paid by the due date for payment.

Like both the West Coast and Queensland (but not the other East Coast) legislation, Cole's Bill requires adjudicators to be registered. Like the Queensland legislation, the Bill provides for the appointment of a registrar to register adjudicators and keep records of adjudicators' determinations and publish them.

The Bill also provides that adjudicators are to be appointed by an Adjudication Registrar. This neither follows the East Coast model's ANA appointment procedure, nor the West Coast model which allows for parties to either agree an adjudicator, agree on a prescribed appointor or, in the absence of agreement, for the applying party to choose a prescribed appointor (as discussed in Chapter 6.5). Although an earlier draft of Cole's Bill did provide that parties could agree on an adjudicator when they sign a contract, Cole subsequently decided to withdraw such provision in the face of criticism that head

contractors, who have greater bargaining strength than subcontractors, would be able to unfairly influence the identity of the adjudicator (Cole 2003: 266).

Uniquely, Cole's Bill provides for adjudicators to be registered on different lists, reflecting their eligibility to conduct different types of adjudication. The Bill also allows the Adjudication Registrar to define any criteria for registration on such lists.

The Bill allows a claimant 20 days to lodge an adjudication claim from the date on which a payment claim is either rejected, disputed or not paid in full by the due date for payment. A respondent must then submit a written response to the adjudication claim within 10 days after receiving the claim (unless any further time is agreed by the claimant or determined by the adjudicator). If the respondent does not duly submit a written response, the adjudicator must determine the claim in favour of the claimant. These timescales are generally around double the length of those prescribed under the East Coast model, but are a bit shorter in length than those prescribed under the WA Act (as further discussed in Chapter 6.5).

An adjudicator has 10 days to make his or her determination from the end of the period which the respondent had to submit their written response to the adjudication claim.

Parties to adjudication proceedings are not allowed to be represented by legal practitioners unless the adjudicator permits. An adjudicator may permit legal representation at his or her discretion if he or she forms the view that this would assist the adjudicator in the resolution of the issues raised in the adjudication proceeding. Cole (2003: 265) considered that this approach strikes an appropriate balance as:

Where lawyers are necessary, the adjudicator will allow them. Where they are not necessary, their presence is likely to slow down the adjudication process to the detriment of the efficacy of that process.

Similar to the East Coast model, the Bill limits the matters which an adjudicator must consider in making his or her determination and does not encourage the adjudicator to take an investigative role. Unlike the East Coast model, however, one of the matters which an

adjudicator must consider is ‘any other amounts owing or offsets claimed under the construction contract.’

Like both the East and West Coast models, Cole’s Bill provides for an adjudicator’s determination to be enforced in the same manner as a court judgment, and for a party to suspend work where a determined amount due to the party is not paid by the due date.

On the other hand, and unlike both the East and West Coast models, the Bill provides for a party to be entitled to lodge a charge or lien over the assets of the other party to secure an adjudicated amount which has not been paid by the due date. Further, if a party has obtained the leave from a court of competent jurisdiction to enforce any unpaid portion of an adjudicator’s determination, the Bill provides that the claimant may obtain payment of this amount out of money that is payable, or becomes payable, to the respondent by the owner (ie, the party who engaged the respondent to carry out the relevant construction works or supply the goods and services under the construction contract).

8.5.2 Davenport’s Proposal for a Dual Process of Adjudication

Davenport (2007) has proposed a dual process of adjudication which aims to combine the East Coast and West Coast model statutory adjudication processes in order to ‘solve many of the perceived problems with adjudication in the building and construction industry’ (Davenport 2007: 12).⁸⁸⁹ He states that (2007: 15):

The proposed dual process would retain the [East Coast] certification process for purely progress payment claims, i.e. for claims for the value of work, goods or services that have actually been provided, and would adopt the traditional [West Coast] process for other payment disputes.

Davenport (2007: 16-17) cites examples of such ‘other payment disputes’, which are termed ‘ex-contractual claims’ or ‘money claims’ (Brand and Davenport 2010), as including, amongst others: a contractor’s claim for delay damages for breach of contract by the principal, a contractor’s claim for the value of extra work carried out for which the superintendent refuses to direct a variation in writing, a principal’s claim for liquidated or general damages for delay in achieving practical completion, and a principal’s claim for

⁸⁸⁹ This proposed dual process is further discussed in: Brand and Davenport (2010); Brand, and Davenport (2011); Brand and (2011a).

the costs of having work carried out under the contract, which the contractor disagrees is included in the contract, by another contractor.

Davenport (2007: 15) explains that his proposed dual process of adjudication, ie a ‘certification process’ and a ‘traditional process’,⁸⁹⁰ ‘would be basically the same as now exists but with slightly different rules for dealing with progress claims and ex-contractual claims.’

This would, therefore, allow an adjudication process which is faster-track, cheaper and significantly more restrictive on the investigative powers of the adjudicator for purely progress payment claims. But it would also have a quasi-judicial adjudication process for adjudication of ex-contractual claims where, as Davenport (2007: 19) points out, an adjudicator ‘is more likely to call for further submissions or hold a conference or make an inspection.’

Notably, however, Davenport has proposed some significant procedural modifications with respect to the operation of the traditional West Coast process for adjudication of ex-contractual claims. Under his dual process model, a statutory system, similar to the current statutory payment system under the East Coast model for progress payments, is prescribed for the serving of ex-contractual claims by claimants and defences by respondents prior to the lodging of a traditional process adjudication application. This statutory system provides that:

- the claimant of an ex-contractual claim must endorse its claim as being made under the Act;
- the respondent has a prescribed period (Davenport uses an example of 10 business days in this respect) to provide a defence;⁸⁹¹

⁸⁹⁰ Brand and Davenport (2010; 2011a) alternatively refer to the processes as the ‘defined scheme’ and the ‘non-specific scheme’.

⁸⁹¹ Davenport (2007: 17) notes that the term ‘defence’ is used in order to avoid confusion with a payment schedule.

- if no defence is served within the prescribed period, a second chance to serve a defence within a further prescribed period would be permitted subsequent to a reminder notice from the claimant;
- failing the serving of the second chance defence, a claimant could initiate an adjudication by making an application to an authorised nominating authority; and
- a respondent who fails to serve a defence within time would be precluded from making an adjudication response.

There would, however, be no ‘reference dates’ for ex-contractual claims, because such claims are for an amount (whether a debt or damages) allegedly due when the claim is made (Davenport 2007: 17). Further, the adjudicator would not decide a due date for payment, as happens with a progress payment claim under the East Coast certification process as any amount which is determined as due by the adjudicator becomes due on the date which the ex-contractual claim was made.

Another key difference between Davenport’s traditional process of adjudication and the current West Coast process is that, under Davenport’s model, respondents to ex-contractual claims could provide a defence or a cross-claim, or a defence and cross-claim, within a prescribed period. Further, if the defence includes a cross-claim, the claimant would have a prescribed period in which to lodge a response (to be called a ‘rejoinder’). Davenport (2007: 18) states that: ‘This simply mirrors the usual processes of claim, defence, cross claim and rejoinder familiar to arbitrators and courts.’ A purchaser who had obtained a determination for an ex-contractual set-off claim under the traditional process of adjudication in Davenport’s model would then be entitled to have that set-off against a progress payment amount being determined under the certification process of adjudication.

There are a number of problems with Davenport’s dual process model. By effectively introducing a further separate statutory system for ex-contractual claims (which includes strict deadlines for serving claims, defences, cross-claims, rejoinders, reminder notices for defences, and second chance defences), in addition to the separate statutory system that currently exists for progress payment claims under the East Coast model, the model:

- is highly complex and sets up a minefield of procedural traps;

- has the potential to significantly interfere with the parties' freedom of contract in a similar vein to the East Coast model with respect to progress payments (as discussed in Chapter 6.11); and
- by denying the respondent an opportunity to be heard by the adjudicator with respect to ex-contractual claims, where the respondent has not made a defence within time, fails to provide the fundamental levels of procedural justice expected in a dispute resolution process (as discussed in Chapter 7.4.1).

Furthermore, based on the NSW Court of Appeal's decision in *Chase*,⁸⁹² a mistake by an adjudicator in determining that any one of the various deadlines has been met is likely to result in the adjudicator's determination being set aside on the basis of jurisdictional error.

8.5.3 Bailey's Proposal for a Cap on Claim Amounts

Bailey (2009: 3) advocates a cap on claim amounts under rapid mandatory adjudication schemes for payment, thereby confining the benefits of the 'short, sharp interim adjudication procedure' to participants in small business. Accordingly, Bailey (2009: 3) states:

If the intended small business focus of the reform had been more narrowly defined in the legislation and the process refined for that sector of the construction industry, then the complexities that pervade the process might not have developed as they have.

The proposed scheme essentially involves capping 'the value of claims and the amount of main contracts and sub-contracts which are to be subject to the process ... with limited or scaled or stepped processes defined' (Bailey 2009: 3).

Further, Bailey (2009: 3) proposes that:

the scheme should be limited only to claims for payment for the value of work performed. This necessarily will include work outside the contractual scope (ie variations). Time-related claims, other than those for which there is established entitlement under contractual regimes, ought be excluded.

⁸⁹² *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190, as discussed in Chapter 7.6.2.

Thus, larger and/or more complex disputes arising in the construction industry would not be subject to statutory rapid adjudication, instead being ‘dealt with under procedures that are developed specifically for them including commercial arbitration’ (Bailey 2009: 3).

Bailey’s proposal, however, will leave some contractors susceptible to rapid adjudication claims from their subcontractors without having available a similar rapid recovery process against their own principals. Further, it is contended that the unavailability of a rapid adjudication process to medium and large businesses would mean that:

- cash flow would not improve for those businesses whose survival can also be vulnerable to security of payment problems, especially in bad economic times;⁸⁹³ and
- the construction industry would miss the opportunity to potentially benefit from a reduction in the costs of disputing brought about by the use of an appropriate form of rapid adjudication which encourages alternative dispute resolution.

8.6 Summary of Findings

There is a broad consensus that harmonisation of security of payment legislation in Australia is needed in order to rationalise operational and administrative costs resulting from the inconsistencies that presently exist. The harmonising proposals reviewed above suggest that any unifying scheme needs to appropriately cater for both interim progress payment claims and other types of contractual payment claims, as well as claims for differing amounts of money. With this in mind, the next chapter concludes this thesis by proposing a unifying approach, which is informed by the review and evaluation of the Australian statutory adjudication schemes presented in Chapter 7.

⁸⁹³ For example, Zhang (2009: 394) refers to the sentiment expressed that, had the WA Act come into operation sooner, it may have saved Consolidated Constructions (one of the State’s largest building contractors) from going into voluntary administration and then liquidation.

Chapter 9

Conclusion and a Proposal for Reform

9.1 A Summary of the Performance of the Australian Legislation

Eight different Acts exist in the Australian States and Territories with respect to security of payment in the building and construction industry. From these Acts, two broad legislative models can be discerned. The models have become commonly referred to as the ‘East Coast’ and ‘West Coast’ models. The legislation arose in response to:

- the widespread problem of slow and/or disputed payment for work undertaken in the building and construction industry (as discussed in Chapter 4.1);
- the inefficacy of existing dispute resolution processes, particularly litigation (as discussed in Chapter 2.2.1) and arbitration (as discussed in Chapter 3.4), in providing a practicable means of obtaining swift and affordable recovery of outstanding contractual payments ; and
- shortcomings in the other options available to tackle the security of payment problem (as discussed in Chapter 5).

The two Australian models provide, although in differing forms, a payment system and an adjudication scheme. The East Coast model provides a separate statutory payment system which runs alongside the parties’ contractually agreed payment mechanism, and applies only to progress payment claims for construction work undertaken or related goods and services supplied. The West Coast model provides a means of enforcing the parties’ contractually agreed payment mechanism where one exists, and applies to all payment claims under the contract.

The East Coast model’s adjudication scheme limits the matters which an adjudicator may take into account when making a determination, and has the potential to bar a respondent to a payment claim from being heard by the adjudicator if the respondent fails to give reasons for withholding payment within the timeframe prescribed in the statutory payment system. In contrast, the West Coast model’s adjudication scheme is more evaluative, encouraging the adjudicator to inform him or herself in any way he or she thinks fit.

Further, under the West Coast scheme, a respondent to a payment claim cannot be denied an opportunity to be heard by the adjudicator.

A consideration of the operation of the East Coast scheme indicates that the scheme has been effective in meeting the objective emphasised by parliament during its enactment, namely the swift and cheap resolution of progress payment claim disputes in order to improve short term cash flow to *smaller* subcontractors and suppliers in the construction industry. As compared to the West Coast scheme, under the East Coast scheme:

- adjudication uptake rates for smaller payment claims (ie, below \$25,000) are, generally, far higher (see Chapter 7.2);
- adjudication fees are significantly lower for smaller payment claims – although for larger payment claims (ie, over \$100,000), adjudication fees are significantly higher (see Chapter 7.3.1); and
- the time from serving of payment claim to adjudication determination is generally 1 to 2 weeks quicker (see Chapter 7.3.2).

However, the broad coverage of the East Coast model, extending to construction contracts and progress payment claims of all sizes, together with the ‘mission drift’ that has occurred in practice to allow recovery of claims for damages under the contract (as discussed in Chapter 7.4.1), has resulted in the inadvertent use of the East Coast scheme to determine a wide range of payment claims, both with respect to size and nature. As McDougall J pointed out in *Clyde Bergemann v Varley Power*:⁸⁹⁴

When the *Building and Construction Industry Security of Payment Bill* was reintroduced into Parliament on 8 September 1999, the Minister made it clear that the underlying intention was to assist “small subcontractors, such as bricklayers, carpenters, electricians and plumbers” to get paid for their work ... Against that background, it may be doubted whether the legislature contemplated, when it enacted what is now the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act), that its benefits would extend to payment claims of about \$3.955 million, relating to major infrastructure projects, as is the case in these proceedings.

⁸⁹⁴[2011] NSWSC 1039 at [1].

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The fact that the East Coast scheme has, in practice, strayed into the realms of determining large payment claims, and payment claims for damages within the scope of the contract, means there is a mismatch between the design of the East Coast scheme and its suitability to effectively resolve disputes over such claims. Designed primarily as a certification process for the fast and cheap resolution of interim progress payments, the drafters of the East Coast adjudication scheme had no aspirations for it to be used as a method of alternative dispute resolution (ADR) for the final settlement of large and/or complex payment claims. As Bell and Vella (2010: 572) state:

Rashda Rana has characterised the overriding judicial concern in these States [ie, the East Coast model States of NSW and Queensland] as being that the person for whom the work has been done “pay[s] *something* now”.⁸⁹⁵ Thus, the goal of the courts in New South Wales and Queensland appears to have become aligned with the underpinning concern of the legislation to ensure that cash continues to flow to the claimant in the short term, even though it is recognised that “the inherent limitations in the adjudication process, and the interim nature of the procedure, mean that it could not be seen as an accurate predictor of the outcome of a fully prepared hearing”.⁸⁹⁶

As such, the East Coast scheme generally measures up poorly against the key criteria, identified from the dispute resolution literature (as outlined in Chapter 2.8), by which dispute resolution systems can be evaluated. In particular, the East Coast scheme:

- fails to provide even the most basic elements of procedural and distributive justice one would expect from an ADR process, such as the opportunity for both parties to be heard by the independent tribunal in all cases and the determination of payment obligations in accordance with that agreed in the parties’ contract (see Chapter 7.4) ;
- does nothing to enhance, or repair, the ongoing commercial relationship between the disputing parties, and may even have a negative impact on the relationship to the point of total breakdown (see Chapter 7.5); and
- is failing to provide a basis for a stable resolution of payment disputes,⁸⁹⁷ as evinced by the plethora of litigation it has generated in NSW and, to a lesser extent, in

⁸⁹⁵ Citing Rana (2006: 516), emphasis added.

⁸⁹⁶ Citing *Walter Construction Group v Robbins Co* (2005) 21 BCL per McDougall J at [30].

⁸⁹⁷ For example, see *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 29, where the Supreme Court of Queensland set aside an adjudication determination for almost \$87 million, as discussed in Chapter 7.6.2.

Queensland, where disgruntled respondents frequently challenge adjudicators' determinations (see Chapter 7.6).

The failure of the East Coast scheme to deliver an effective ADR process for large payment claims and payment claims for damages under the contract means that it has missed a significant opportunity to reduce the costs of disputing in the construction industry.⁸⁹⁸ This represents, in economic terms, a significant opportunity cost. Indeed, it may be viewed as ironic that a legislative scheme which has the potential to reduce litigation in the construction industry is creating so much litigation in the form of applications for judicial review of adjudicators' determinations (see Chapter 7.6.1). The ability to use adjudication as an effective ADR process is not only needed, but is desired by parties in the construction industry. As Shnookal (2010: 18) observes:

typically, a party that starts an adjudication does not want to just be paid its progress payment, it wants to resolve the entire dispute. We all know adjudication is an interim decision, but we also know from experience that adjudication usually leads to a negotiated settlement of the entire dispute ... I argue that adjudication is a form of alternative dispute resolution, not just a statutory right to a payment claim.

The West Coast scheme, having been designed to cover all contractual payment disputes, and with its respect for the primacy of contract, generally measures up more satisfactorily than the East Coast scheme against the key criteria by which dispute resolution systems can be evaluated (see Chapter 7.4). For example, in contrast to the East Coast scheme, under the West Coast scheme:

- neither party will be precluded from making an adjudication application, or from being able to present its full case to the adjudicator;
- an adjudicator will be able to adopt a more investigative role when determining a payment claim;
- legal representation at adjudication conferences may be permitted at the adjudicator's discretion; and

⁸⁹⁸ As occurred, for example, in the UK where statutory adjudication has contributed to a large drop in the amount of construction litigation (see Chapter 6.10).

- the adjudicator's determination is more likely to reflect an outcome based upon the parties' agreed contractual payment provisions.

Consequently, in order to finally settle their contractual payment disputes, the parties are more likely to use the West Coast adjudication scheme as either:

- an ADR process *per se*; or
- a low cost, rights-based procedure within a dispute resolution system, which establishes a rights boundary within which a negotiated resolution can be sought (see Chapter 2.6).

It is no coincidence that under the West Coast scheme there have been far fewer applications for judicial review of adjudicators' determinations in WA, than under the East Coast scheme in NSW and Queensland (see Chapter 7.6.1).

9.2 The Proposed Harmonising Scheme

Building upon Davenport's concept of a dual process and Bailey's concept of claim capping (as discussed in Chapters 8.5.2 and 8.5.3 respectively), a hybrid scheme is proposed which would operate a dual process of adjudication according to the amount of a progress payment claim.

It would employ a 'regulatory' process based on the Australian East Coast model's adjudication scheme, together with its statutory payment system, for small progress payment claims falling below a prescribed cap amount. All payment claims above the cap amount would be determined under an 'evaluative' process based on the Australian West Coast model's adjudication scheme, together with its support for the primacy of contract. Based on the data reviewed in Chapters 7.2 and 7.3, it is suggested that the cap amount should initially be \$25,000. Alternatively, instead of a progress payment claim amount, the threshold between the regulatory and evaluative process could operate according to a prescribed contract sum (eg, \$100,000), with the regulatory process being used for progress payment claims on all construction contracts below a prescribed contract sum and the evaluative process for those above.

Payment claims adjudicated under the regulatory process would be strictly limited to progress payment claims for construction work undertaken or related goods and services supplied which are below the cap amount. Progress payment claims which are above the cap amount would be adjudicated under the evaluative process. Additionally, any payment claims made under the contract other than progress payment claims (eg, delay damages claims by contractors, or liquidated damages claims by principals) would be adjudicated under the evaluative process, regardless of size.

The proposed dual process scheme would allow both of the current legislative schemes which have become established in the Australian jurisdictions to be used in a harmonised model without any significant procedural changes to either existing scheme. This would not only combine the strengths of both schemes, but would be more conducive to achieving consensus among all the Australian jurisdictions.

The proposed dual process scheme would have the following features:

1. All payment claims, regardless of amount, under construction contracts with home owners would be adjudicated under the evaluative process. The evaluative process is less harsh than the regulatory process and, as such, is more appropriate for applying to home owners, as occurs under the West Coast model Acts. This would remove the gap in coverage which presently exists under the East Coast model Acts (with the exception of Tasmania) with respect to contracts with home owners, as discussed in Chapter 6.4.
2. The claimant of a progress payment claim which is less than the cap amount would have the option to apply for adjudication under the evaluative process instead of the regulatory process if they so choose.⁸⁹⁹ This would mean that a claimant, who has lost its right to adjudication under the regulatory process due to failing to endorse its payment claim as being made under the Act, could still apply for adjudication under the evaluative process. Additionally, it would provide access to the evaluative process for a claimant who:
 - was concerned that the regulatory process would have detrimental effects on its ongoing relationship with the respondent (as discussed in Chapter 7.5); and

⁸⁹⁹ As suggested by Robert Fenwick Elliott upon review of the proposed dual process scheme.

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- believed that the evaluative process, which would allow the adjudicator wider procedural flexibility, would be more likely to result in the resolution of the progress payment dispute in a conciliatory manner.
3. Adjudicators would need to be registered in order to determine payment claims. As per Cole's Bill (see Chapter 8.5.1), two different registration lists would exist. There would be one list for adjudicators eligible to determine progress payment claims under the regulatory process, and another for adjudicators eligible to determine payment claims under the evaluative process. The defined criteria for registration on each list would reflect the appropriate levels of training and experience deemed necessary in order to determine the different types of claims covered under each process. The requirement for separate adjudicator registration for each process would ensure an appropriate quality of adjudicator for the types of claims being determined under each process.
 4. The parties would be able to agree upon the identity of either an adjudicator or an Authorised Nominating Authority (ANA) under the evaluative process, but only after the dispute has arisen (as per the NZ Act). This would enhance procedural fairness, without providing the opportunity for either party to unduly influence the identity of the adjudicator (as discussed in Chapter 7.4.1). In the event that the parties either do not, or cannot, agree on an adjudicator or ANA, the claimant would submit an adjudication application to an ANA of their choice (as per the NZ and UK Acts). Because either contractors or principals may make adjudication applications under the evaluative model, there is *less* room for any perception, as exists under the East Coast model, that ANAs may be biased towards claimants in order to gain their repeat business with respect to larger payment claims.
 5. Under the regulatory process, the claimant would submit an adjudication application to an ANA of their choice. Because the regulatory process is restricted to smaller progress payment claims, for the reasons discussed in Chapter 7.4.1, any perception of ANA bias towards claimants would not be such a significant issue as for larger payment claims.

6. An adjudicator would have a reduced period of time in which to make his or her determination under the regulatory process in the circumstances where the respondent has either failed to provide a payment schedule or to pay the scheduled amount which has been accepted by a claimant. This would have the effect of expediting cash flow to the claimant where its payment claim is undisputed. It is proposed that, in such circumstances, the time for determination be reduced to 5 working days (as per the Singapore Act), on the basis that there is effectively no dispute for the adjudicator to consider.
7. An adjudicator would have four weeks (as per the NZ and UK Acts), instead of the two weeks allowed in the West Coast scheme, to determine a payment claim under the evaluative process. Further, this four weeks would begin to run from the end of the period which the respondent has to lodge an adjudication response (as per the NZ Act), instead of from the date on which the adjudication response was lodged (as is the case under the West Coast scheme). Extending the period for the adjudicator to make his or her determination is justified on the basis that, under the proposed dual process scheme, the evaluative process is only being used to determine claims which are typically more voluminous and/or complex in nature. Extending the time for determination would further enhance the procedural and distributive justice credentials of the evaluative process, thereby improving the likelihood that the parties will use it as an ADR process in order to finally settle their dispute.
8. The adjudicator would be able to limit the length of written documents or oral representations (as per *The Scheme for Construction Contracts Regulations* in the UK), in order to limit the scope for parties to launch ambush claims in adjudications (see Chapter 7.4.1).

9.3 The Case for the Proposed Harmonising Scheme

The case for the proposed dual process scheme of adjudication is predicated on the notion that a ‘one-size fits all’ approach for the construction industry has proven inappropriate. Several distinct differences exist between firms at the higher and lower ends of the hierarchical contracting chain on construction projects in relation to, amongst other things:

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- commercial vulnerability of contractors to cash flow problems, with respect to financial resilience and exposure to payment defaults of firms above in the contracting chain (see Chapter 4.3);
- the use of balanced standard forms of contract, especially the inclusion of impartial independent certifying mechanisms for progress payment in contracts (see Chapter 4.3.3); and
- the need, and desire, for the parties to be able to use adjudication as an ADR process by which final resolution of contractual payment disputes can be reached (see Chapter 9.1), and not just as a mechanism for speeding up cash flow of progress payments.

There is a ‘good reason’⁹⁰⁰ which justifies the use of the regulatory process, with its significant incursion into freedom of contract, for smaller progress payment claims. That is to protect the commercially more vulnerable smaller businesses in the lower tiers of the hierarchical contracting chain, where significant inequality in bargaining power between contractors and their principals frequently leads to the absence of fair interim progress payment provisions in contracts.

The same reasoning, however, cannot be applied to the upper tiers of the contracting chain, where parties (such as commercial property developers, head contractors and large sub-contractors) are likely to be on a more equal footing with respect to bargaining power, and have entered into contracts (typically industry standard forms) which provide independent certifying mechanisms for progress payments.

Under the proposed dual process scheme, therefore, larger progress claims would be determined under the evaluative scheme which supports primacy of contract.

The proposed dual scheme remains true to the original legislative intents, as well as capitalising on the relative strengths, of both the East and West Coast models.

⁹⁰⁰As called for in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at [31] and [32], as discussed in Chapter 6.11.

By confining the use of the East Coast's regulatory process to small progress payment claims, the original parliamentary focus on protecting the smaller subcontractor would be retained. The strength of the East Coast scheme would also be harnessed, being the relatively high uptake rates and efficiency (in terms of duration and adjudication fees) of its adjudication scheme for smaller payment claims.

By using the West Coast model's evaluative process for larger progress payment claims and contractual payment claims other than progress claims, the original parliamentary aim of 'sidelining protracted or complex disputes' (MacTiernan 2004: 275) would be retained. The strength of the West Coast scheme would also be harnessed, being the higher levels of procedural and distributive justice it affords as a dispute resolution process as compared to the East Coast process (see Chapters 7.4.1 and 7.4.2). This means, as discussed in Chapter 9.1, that it is more suitable than the regulatory process for use as an ADR process, especially for payment claims which are voluminous and/or complex in nature, by parties who wish to finally settle their disputes without recourse to costly arbitration or litigation procedures.

At the same time as gaining a potentially effective ADR process, contractors who are obliged to use the evaluative process under the proposed scheme would not be denied access to a rapid adjudication process for progress payments in order to improve their cash flow, albeit three to four weeks slower than for smaller contractors under the regulatory process. This is important as it ensures adjudication is available to facilitate the rapid flow of cash throughout the entire contracting chain. If adjudication were not to be available for larger progress payment claims, the cash flow to parties higher up in the contracting chain would be stemmed. Consequently, contractors who submitted larger progress payment claims to their principals would be unfairly disadvantaged as, whilst their subcontractors would have the right to swiftly recover smaller payment claims from them in adjudication, they would not have the right to recover such claims in adjudication against their principals. This would, in turn, increase the likelihood of contractors further up the contracting chain becoming insolvent, which would cause further payment problems for, and potentially insolvency of, smaller contractors below.

9.4 The Process of Reform

It is recommended that the concept of a dual process scheme of adjudication based upon the size of payment claim, as proposed in Chapter 9.2, be adopted as the basis for nationally unifying security of payment legislation in Australia.

In order to fine tune the proposed scheme to best meet the needs of the construction industry, consultation should be carried out with stakeholders in the legislation as to the inclusion, form and detail of certain provisions. The matters to be canvassed might usefully include:

- whether the threshold between the regulatory and evaluative adjudication processes should be set according to the amount of progress payment claim or contract sum, and what the value of the cap should be;
- what are the most appropriate timescales for the procedural deadlines prescribed under the regulatory process, such as those for serving payment schedules and lodging adjudication responses;
- whether the regulatory process should, like the NSW Act, provide provision for payment withholding requests to be served on principal contractors (see Chapter 6.5);
- whether the evaluative process should cover all disputes under a construction contract, and not just payment disputes, as per the UK and NZ Acts (see Chapter 6.10);
- whether parties should, like the UK Act, be able to establish the details of their own adjudication scheme under the evaluative process subject to the inclusion of certain key provisions (see Chapter 6.10); and
- what the defined criteria should be for registration of adjudicators on the lists for each process.

Preferably, to ensure ongoing consistency in the legislation, the unified scheme should be enacted as a single Commonwealth Act. Further, to ensure the cooperation of the States and Territories, the text of the Commonwealth Act should ideally be agreed to by the States and Territories, ie in the form of a text-based referral (see Chapter 8.4). As Bell and Vella (2010: 577) observe:

It is ... not surprising that commentators are suggesting that the logical vehicle for a uniform scheme is by way of Commonwealth legislation, perhaps by way of a two-stage process (a model law adopted by all States and Territories, followed by the referral of the law making power to the Commonwealth and the enactment of a single, Commonwealth Act) akin to that which evolved in relation to the corporations law.

However, if the States, Territories and federal government are unable ‘to confront their constitutional and political difficulties in power-sharing’ (Zhang 2009: 376), it is recommended that the Commonwealth enact overriding federal legislation, which does not require State support, on the basis that Commonwealth legislation would cover the vast majority of construction contracts in Australia (see Chapter 8.4).

9.5 Evaluating the New Scheme

All the Australian statutes require the relevant Minister to periodically review their operation.⁹⁰¹ A fault, however, exists in these review provisions in that they fail to provide adequate guidance and detail with respect to the way in which the review process is to be carried out. Reviews, to date, have typically focussed on industry consultation by way of inviting submissions in response to a discussion paper,⁹⁰² which identifies relevant industry issues and possible improvements to the legislation. Although important, this approach by itself falls short of providing the basis for a fully informed evidence-based review, which is needed to ensure that the policy objectives and performance of the legislation are in line both with each other, and with the needs and wants of the construction industry. For example, there is a dearth of information with respect to individual user satisfaction, and as to the consequences of adjudication on overall dispute resolution costs in the construction industry.

Therefore, once the process of reform is up and running, it is important that the unifying legislation outline the details of an evaluative system of review in order that the same problem does not occur. As discussed in Chapter 2.8, to ensure that it works well, the

⁹⁰¹ Section 38 of the NSW Act states that: ‘The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives’. Section 56 of the WA Act states: ‘the Minister must review the operation and effectiveness of this Act ...’

⁹⁰² See, for example: Victorian Building Commission (2004); NSW Department of Services, Technology & Administration (2010); Queensland Building Services Authority (2010).

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methodology of evaluation should be considered at an early stage during the drafting of the unifying legislation. Whilst the precise details are beyond the scope of this thesis, it is suggested that a similar approach be followed to that used in the recent post-implementation review of the Commonwealth *Fair Work Act 2009*.⁹⁰³ This would entail the prescription of appropriate key evidence gathering from a range of sources regarding the operation of the legislation, to be undertaken by a panel of independent experts, including:

- the release of a background paper [or discussion paper] on the ... legislation inviting stakeholders to make a submission to the review,
- meetings with key stakeholders/roundtable discussions to outline their experiences with the ... legislation, and
- the commissioning of any additional quantitative and qualitative data that may be required (Commonwealth Department of Education, Employment and Workplace Relations, 2011).

This would ensure that, once the unifying legislation is implemented, ‘the new measures can be closely monitored, to enable the evaluation of their effectiveness in achieving the Government's policy objectives ... in a clear and transparent manner.’⁹⁰⁴

The review would culminate in the expert panel delivering a comprehensive evidence-based report to the Minister, which draws conclusions about whether the legislation is meeting its objectives and includes recommendations for any changes to the legislation arising out of the review. It is recommended that the first review take place within three years of the commencement of the unifying legislation.

9.6 Concluding Comments

The commencement of eight separate and differing security of payment Acts in a piecemeal fashion, over the past 12 years, has created an inconsistent national legislative framework, which is confusing for interstate operators to navigate in the Australian construction industry. Furthermore, the inconsistent state of the legislation has given rise

⁹⁰³ See further the Australian Government's *Fair Work Act Review Background Paper*, Jan 2012, available at http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/FWARReview_Background_Paper.pdf, viewed 14 June 2012.

⁹⁰⁴ *Fair Work Bill 2008* Explanatory Memorandum, at [342].

to unnecessary costs in its operation, both to the construction industry and the public purse.

The two broad models for this legislation were introduced with the common fundamental objective of improving cash flow in the construction industry. The East Coast model achieves this objective in a fashion which interferes with contractual payment provisions, and affords little in the way of procedural and distributive justice in its adjudication scheme. These characteristics have resulted in a scheme which appears to be efficient, effective and well used for securing smaller progress payments. Yet the same characteristics have brought about unanticipated problems and significant opportunity costs for the construction industry with respect to resolution of disputes concerning larger payment claims.

The starkly differing approach of the West Coast model gives primacy to contractual payment provisions, and affords more in the way of procedural and distributive justice in its adjudication scheme than the East Coast model. These characteristics have resulted in a scheme which arguably provides a more satisfactory process for determining larger payment claims, but is not as efficient or well used for securing smaller progress payments as compared to the East Coast approach.

Thus, whilst both models have their strengths, each is unable by itself to deliver benefits across the broad spectrum of businesses in the construction industry. Arising from the quagmire of legislative inconsistency, however, is a unique opportunity for Australia to capitalise at a national level from its collective experiences at a State and Territory level.

This thesis has put forward an overwhelming case for national reform. A clear way forward has been recommended via the enactment of a unifying dual process security of payment scheme according to the size of progress payment claim, which draws together the strengths of the existing schemes in order that both small and large businesses may benefit.

Now that legislation has been enacted in all the Australian jurisdictions, the time is ripe for this reform. Furthermore, the cost benefits delivered by the proposed reform would ‘act as a buffer’ (Zhang 2009: 394) during the current downturn in privately funded building

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activity currently being experienced by the construction industry. With the construction industry accounting for around 7% of Australia's Gross Domestic Product, and employing around 9% of the workforce (Australian Bureau of Statistics, 2010), unifying reform of security of payment legislation is too important an issue for Australia's governments to ignore.

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