

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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Date:

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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