Security of Payment Legislation in Australia: Issues with Adjudication Decisions

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Abstract

Purpose - The purpose of this paper is to provide insights into the existing legislative system and court cases pertaining to the security of payment legislation as it applies to the construction industry across Australia.

Design/methodology/approach – The method employed is derived from the literature involving the identification, examination and comment on legislation and pertinent court cases which address such legislation.

Findings – The paper provides comparative details of the security of payment legislation as it has evolved in the States and Territories of Australia. A key issue emanating from the expose on the court cases is the differentiation made between adjudication and arbitration and in particular the right of a court to overturn a decision made under adjudication, a right that does not exist in regards to arbitration.

Research limitations/implications – This is not an empirical study and accordingly is limited to providing basic details specific to the legislation and the court cases selected.

Keywords: Security of payment legislation, adjudication, construction industry, commercial construction.

JEL Classifications: K12; K33; K41
PsycINFO Classifications: 3660
FoR Codes: 1801; 1503
Introduction

Construction is a key economic driver in market economies worldwide. Substantial engineering ventures, including public infrastructure and commercial and residential construction projects, have the potential to attract significant levels of public, as well as, private domestic and foreign investment capital.

Risk is inherent throughout the construction process. Appropriate risk mitigation strategies are applied to quantify and manage identifiable risk factors. Clients (investors) are concerned with the contractor’s ability to delivery on time, to specification, and within budget. Contractors are concerned with the client’s ability to pay in full, on time, for works as they are completed (Kwan & Leung 2011; Besner & Hobbs, 2012). Even where a contract is specific and the price is ‘fixed’ contractors need to implement appropriate risk mitigation and risk management strategies to avoid project, and or their own, collapse (Chan, Chan, Chan & Lam, 2012).

Construction law has been described as a generic term that covers a variety of legal principles pertaining to the construction of structures on land (Gerber, 2010). Of course this extends equally to construction underground as well as on or under water. The construction process in its simplest form may be described as involving the stages of design, bid and build. In effect the design would be done by either an architect or engineer or both, followed by bidding for the work by contractors, via a tendering process, who then undertake the work to construct the project. As a consequence construction law is significantly entwined with contract law, and to a lesser extent, legal principles such as torts, equity, and a variety of statutory legislation. For this reason construction law is a somewhat neglected topic in the literature, this paper seeks to address this oversight by addressing one area of concern in the industry, namely the security of payments legislation.

A uniform and clearly defined legal framework across all state and federal jurisdictions relating to the provision of construction projects is required to maintain contractor and investor confidence to ensure project delivery and to sustain economic growth (Lam & Chen, 2013).

Australia – significance of the construction industry

The Australian construction industry plays a significant role in the nation’s economic development. It operates in both the private and public sectors of the economy. It comprises three primary groupings 1. Construction Services; 2. Building Construction; and 3. Heavy and Civil Engineering Construction. In aggregate it employs approximately 9.1% of the Australian workforce and has historically contributed around 7% of the nation’s Gross Domestic Product (GDP) making it the fourth largest contributor behind Finance and Insurance Service (10.8%), Manufacturing (9.4%) and Mining (7.7%) (ABS Cat.No.1350.0 - Australian Economic Indicators, Oct 2010).

Construction demand is driven by economic and demographic factors including business and consumer sentiment, inflation and population growth. The construction industry is highly sensitive to the cost and availability of capital. Government fiscal policy and Reserve Bank monetary policy can both stimulate and dampen construction activity and the industry is predominantly therefore cyclical in nature. Construction activity is closely linked to the cycles of other industries such as tourism, agriculture, manufacturing and mining (ABS Cat.No.1350.0 - Australian Economic Indicators, Oct 2010). Public infrastructure projects have become an established ‘economic stimulus’ tool of many
western market based economies and to that extent this sector of the construction industry may, at times, be seen as counter-cyclical.

**Security of Payments Legislation**

In Australia each State and Territory has enacted its own version of legislation addressing the security of payments in the construction industry. As a consequence there are instances where material differences exist between the various pieces of legislation. With the exception of articles addressing the New South Wales legislation (Ward, Sher, Gameson & Aranda-Mena, 2007; Uher & Brand, 2008; Brand & Uher, 2010) there has been little attention to this form of legislation in the literature. The ‘Security of Payment’ legislation applicable to each State and Territory is presented in Table 1.

<table>
<thead>
<tr>
<th>State</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>Building and Construction Industry (Security of Payment) Act 2009 (ACT)</td>
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<tr>
<td>NSW</td>
<td>Building and Construction Industry Security of Payment Act 1999 (NSW)</td>
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<tr>
<td>NT</td>
<td>Construction Contracts (Security of Payments) Act 2004 (NT)</td>
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<tr>
<td>Qld</td>
<td>Building and Construction Industry Payments Act 2004 (Qld)</td>
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<tr>
<td>SA</td>
<td>Building and Construction Industry Security of Payment Act 2009 (SA)</td>
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<tr>
<td>Tas</td>
<td>Building and Construction Industry Security of Payment Act 2009 (Tas)</td>
</tr>
<tr>
<td>Vic</td>
<td>Building and Construction Industry Security of Payment Act 2002 (Vic)</td>
</tr>
<tr>
<td>WA</td>
<td>Construction Act 2004 (WA)</td>
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</tbody>
</table>

There is a common intent within the legislation of each State and Territory which may best be defined as seeking to provide a framework for the settlement of disputes regarding construction contract payments; a tenet that may be traced back to the Contractors’ Debts Act 1897 (NSW). With no Commonwealth oversight in this area of business regulation the eight separate Acts have become regarded as the de facto ‘national scheme’. Typically the types of payments covered and that may give rise to a dispute are where there has been an arbitrary reduction in the value of a payment, a late payment and even non-payment in terms of progress payments (Brand & Uher, 2010).

The legislative models of WA and NT differ significantly from the other States and Territories in both their underlying conceptual frameworks and in the detail of their drafting. They bear a closer resemblance to the construction industry payments legislation that was proposed by the Cole Commission Report (2003) and are more aligned with the legislation in the UK and NZ, and for this reason they can be distinguished from the other Australian legislation.

The differences are considered to be sufficient for the WA and NT Acts to be labelled as the “West Coast” model whilst all the other Australian Acts, which more closely resemble the NSW Act, have been labelled the “East Coast” model (Davenport, 2007:12; Davenport, 2010: 36). However in essence they address a common set of issues such as the type of work and contracts covered, the mechanisms for enforcing regular (progress) payments and the process for undertaking and enforcing adjudication of disputes (Bell & Vella, 2010). However, key differences exist between the ‘East’ and ‘West Coast’ models and these are summarised in Table 2:
Table 2:  
Comparison of East Coast to West Coast Legislation Models

<table>
<thead>
<tr>
<th>East Coast Model</th>
<th>West Coast Model</th>
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<tr>
<td>Acts provide a detailed statutory payments regime, overriding any inconsistent contractual provisions, which parties may choose to engage by submitting a payment claim under the Act at regular intervals and have it responded to within a certain timeframe.</td>
<td>Acts largely preserve (rather than override) the parties’ contractual interim payment regimes.</td>
</tr>
<tr>
<td>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).</td>
<td>Acts allow for payment claims both up and down the “contractual stream”.</td>
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<tr>
<td>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.</td>
<td>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.</td>
</tr>
</tbody>
</table>

(Source: adapted from Coggins, Elliot & Bell, 2010)

At the heart of the legislation is the adjudication process. The basic approach to addressing disputes is summarised in Figure 1.

Figure 1:  
Basic Steps in Adjudication Process

(source: adapted from Ward, Sher, Gameson & Aranda-Mena (2007)
Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors (No2) [2010] VSC 340

The relevant facts of this case were:
- an adjudication determination had been made against (APBC) ordering payment to the contractor (Aircon) of $105,647;
- APBC sought a permanent stay on determination on the grounds of alleged impecuniosity of Aircon;
- Aircon sought orders for the payment of the $105,647 plus adjudicator’s fees, expenses and interest (a total of $121,132).

The decision from this case was:
- there was no basis for the court to grant an injunction against the determination;
- the court had the power to enforce the payment of the amount claimed by Aircon of $121,132.

The implications from this case are:
- there are limited circumstances in which a declaration as to existing rights can be stayed;

Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

The relevant facts of this case were:
- an adjudication determination had been made against (Chase) ordering payment to the contractor (Hamo);
- Chase had failed to provide (within the time frame required by the Act) a payment schedule in response to the payment claim made by Hamo;
- Hamo made an adjudication application, but did not give notice within the 20 business days required under the Act [sec 17(2)(a)];
- the adjudicator erroneously concluded that Hamo had given notice within the statutory time limit.

The decision from this case was:
- The court has the prerogative to order relief against an adjudicators decision - the reasoning being that the Supreme Court’s supervisory jurisdiction could be invoked with respect to the exercise of statutory powers, including those of an adjudicator - since they arise out of statute rather than from private agreement of the parties - in contrast to an arbitration;
- The court further held that the Act could not over ride the power of the Supreme Court to review an adjudicator's decision for jurisdictional error;
- The court found that the time limit was a mandatory section of the Act and that failure to comply made the adjudication determination void.
The implications from this case are:

- The decision in this case takes a narrower view of the assessment of adjudication determinations than was determined in Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421.
- The decision places greater emphasis on any and all time limits that may be specified within the Act;
- The decision also makes a very important distinction between adjudication which is stipulated under legislation and arbitration which is the result of private agreement.

**Summary**

The manner in which the securities of payments legislation has evolved with the “West Coast” model based on the UK and NZ legislation and the “East Coast” model more closely aligned with the original NSW Act, is reason for concern for the construction industry. In particular the differences may be more of a hindrance than a benefit when dealing across borders and reliance on court rulings in one jurisdiction would not be advisable.

The decision in *Chase Oyster Bar v Hamo Industries [2010]* would seem to set a precedence by providing a clear distinction between adjudication and arbitration. The court ruled that adjudication was specifically instigated in accordance with the rules provided under legislation and that this very issue is deemed to set it apart from arbitration which is held to be the result of a private agreement. The implications for this are that the court can therefore intervene in disputes pertaining to adjudication determinations unlike disputes relating to arbitration decisions which are held to be outside the power of the Australian courts (Douglas, 2013).

**Reference List**


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1 For a more detailed discussion on the issue of arbitration see the review by Douglas (2013) on the ruling in TCL Airconditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5.


**Cases**

Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors (No2) [2010] VSC 340

Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

**Legislation**

*Building and Construction Industry Security of Payment Act 1999 (NSW)*

*Building and Construction Industry Security of Payment Act 2002 (Vic)*

*Building and Construction Industry Security of Payment Act 2009 (SA)*

*Building and Construction Industry Security of Payment Act 2009 (Tas)*

*Building and Construction Industry (Security of Payment) Act 2009 (ACT)*

*Building and Construction Industry Payments Act 2004 (Qld)*

*Constructions Act 2004 (WA)*

*Construction Contracts (Security of Payments) Act 2004 (NT)*