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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Signed:

Date:
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To Shai, Cameron and Mahalia – my beloved family – you have been the source of my motivation and inspiration for the writing of this thesis. Your love and support have kept me going over the past five busy, yet fulfilling, years. This thesis is dedicated to you.
Publications

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


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<td>ACA</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>ANA</td>
<td>Authorised nominating authority</td>
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<td>APCC</td>
<td>Australian Procurement and Construction Council</td>
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<td>DAP</td>
<td>Dispute Avoidance Process</td>
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