



Australian Government
Department of Employment

Review of Security of Payments laws: Issues Paper

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Background

Security of payments has been identified as an issue in the building and construction industry by many reviews and inquiries over the past 15 years.

Most recently, in December 2015 the Senate Economic References Committee Inquiry into Insolvency in the Australian Construction Industry (Senate Inquiry)¹ found that vastly different security of payments laws operating in each jurisdiction were not working as well as intended and that there were barriers to access. The Committee also found that it is a fundamental right of anyone that performs work in accordance with a contract to be paid without delay for the work they have done.

On 21 December 2016 the Australian Government announced a review of security of payments laws in the building and construction industry (the Review), noting the significant differences in approach to security of payments laws across jurisdictions as an ongoing issue.

The Terms of Reference for the Review are to:

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

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

The Review will seek to identify what measures can be taken to overcome the current fragmented nature of the security of payments laws and consider why subcontractors are either unwilling or reluctant to use the various security of payments legislation and avail themselves of their statutory rights.

The Review is to report back to the Australian Government no later than 31 December 2017 and include a range of recommendations to be considered by Government.

¹ Senate Economic References Committee (2015), *Insolvency in the Australian Construction Industry*, December 2015. Refer to www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report

Key Issues

There is general agreement that government intervention is necessary to enshrine construction contractors' rights to receive prompt payment for work carried out. Indeed, every state and territory government has enacted their own version of security of payment laws.

Notwithstanding the differences between the various security of payments legislation across Australia, there is a widespread acceptance of two fundamental principles.

First, cash flow is the life blood of the industry, and the most effective way in which a contractor's cash flow can be preserved and maintained is through progress payments. This is why the various security of payments laws expressly provide contractors with statutory entitlements to progress payments.

Second, there is recognition that the only reason a head contractor receives progress payments from a principal is due to the fact that the largest portion of the head contractor's claim represents construction work carried out by subcontractors. In other words, but for the construction work carried out by the head contractor's subcontractors, the head contractor would not have had a basis to receive the progress payment it had claimed from the principal.

The late payment of progress payments together with the hierarchical nature of construction contracts make subcontractors highly vulnerable whenever head contractors become insolvent and are unable to pay their creditors, including subcontractors.

These issues have been identified in many inquiries and reviews conducted over the past 15 years to examine what measures can be taken to better secure payments for subcontractors, but are perhaps best summarised by the Report of the Cole Royal Commission into the Building and Construction Industry:

"[Security of payments] ...is an issue that critically affects the ability of participants in the industry to make a living, and to be rewarded for work that they have performed. During the course of their investigations, Commission investigators have repeatedly been told of the suffering and hardship caused to subcontractors by builders who are unable or unwilling to pay for work from which they have benefited. The subcontractors who experience payment problems are often small companies or partnerships. Frequently they do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies. Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and the creditors".²

This paper seeks to identify the key issues surrounding security of payments in the building and construction industry for further consideration by stakeholders.

² Terrence R.H. Cole (2003), *Final Report of the Royal Commission into the Building and Construction Industry*, February 2003, Volume 8, p.229, paragraph 2.

Effectiveness of existing Security of Payments laws

Question 1:

Do you consider that the legislation operating in your jurisdiction is successfully meeting its stated objectives? If so, why? If not, which comparable legislation in other jurisdictions do you consider to be more effective, and why?

It is generally recognised that in the Australian context there are two distinct models for security of payments laws: the 'East Coast Model' and the 'West Coast Model'. Stakeholders are encouraged to consider the relative merits of each model and, in the case of East Coast Model in particular, which legislation within which jurisdiction best meets the intended objective of providing a cost effective rapid adjudication of disputed payment claims.

Key differences between the East Coast and West Coast Models

Notwithstanding significant differences in the relevant legislation, the East Coast Model has been adopted in Queensland, New South Wales, Victoria, South Australia, Australian Capital Territory and Tasmania. The West Coast model applies in Western Australia and Northern Territory, with only minor differences between the relevant legislation in the two jurisdictions.

The key features of the **East Coast Model** are:

- An interim payment regime that operates in conjunction with, and in certain circumstances, overrides the contractual payment regime for work done.
- A claimant's right to make a payment claim is restricted to claims for payment for construction work carried out, or related goods and services supplied, under a construction contract. The Victorian legislation is more restrictive as it excludes certain amounts from being claimed.
- Except in the case of NSW, the Act will apply wherever a claimant identifies that its payment claim is made under that applicable legislation.
- The recipient of a payment claim (i.e. the respondent) is entitled to respond by way of a payment schedule setting out the amount it proposes to pay in response to the claim. If a payment schedule is not issued in response to the payment claim within the prescribed time period, then the recipient will be liable to pay the full amount of the payment claim. However, the recipient retains the right to dispute the claimant's entitlement outside the adjudication process.
- Except in Queensland and Victoria, any reason the recipient may have for not agreeing to pay the amount of the claim must be set out in the payment schedule as no additional reasons for withholding payment is permitted to be subsequently given.
- Any dispute in respect to the amount claimed can be referred for determination via a fast track adjudication process.

The key features of the **West Coast Model** are:

- Like the East Coast Model, the West Coast Model is an interim payment regime providing a fast track adjudication process. However, any party to a construction contract may make an application for adjudication.

- A party can make claims for amounts in relation to the performance or non-performance of obligations under a construction contract. This could include a claim for damages for breach of contract.
- Whereas the East Coast Model prescribes a statutory payment scheme that overrides any inconsistent contractual provisions, the West Coast Model only provides legislative assistance where the construction contract does not contain express terms regarding payment claims and their assessment and payment, by implying terms to deal with such situations.
- Unlike the East Coast Model, the West Coast Model does not require a payment claim to refer to the relevant legislation or require the recipient of a payment claim to include all reasons for rejecting the claim. A party who does not respond to a payment claim by way of a payment schedule is not liable to pay the claimed amount.

1. A two-tier system under the one legislation

Question 2:

Should the legislation provide for two separate types of claims (i.e. 'standard' and 'complex' claims, as is the case in Queensland following the amendments introduced in 2014), or can the legislation provide for one size fits all?

Question 3:

If legislation is to provide for two types of claims, how should these be distinguished? Should it be based on the value of the claim (e.g. an amount of \$750,000 as is the case in Queensland), or the nature of the claim being made (e.g. time-based/delay costs, latent conditions etc.)?

Queensland is the only jurisdiction to provide for a 'two-tier' system, where the timelines associated with the adjudication process in relation to a 'complex' claim differ from the timelines prescribed for a 'standard' claim. This concept followed from one of the major recommendations of the *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry* (Wallace Report)³, which found:

“...the “one size fits all approach” adopted by the current provisions of the Act whilst attractive for its relative simplicity, has the potential to result in significant injustice, particularly to contracting parties in complex matters.

...Although it is by no means perfect, I have reached the conclusion that the most appropriate delineation of whether a claim should be considered under the existing scheme or the “composite scheme” is by among other things, the setting of a monetary limit on the value of a payment claim.

...Whilst I am not particularly wedded to the sum, I have concluded that it is appropriate to tie the monetary limit to that of the civil jurisdiction of the District Court of Queensland, which is currently set at \$750,000”.

³ Andrew Wallace (2013), *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry*, May 2013, pp.182-183. Refer to https://www.qbcc.qld.gov.au/sites/default/files/Final_Report_-_Discussion_Paper_-_Payment_dispute_resolution_in_the_Queensland_building_and_construction_industry_PDF.pdf

In the end the 2014 amendments to the *Building and Construction Industry Payments Act 2004* (Qld) (Queensland Act) defined a complex payment to mean:

“a payment claim for an amount more than \$750,000 (exclusive of GST), or, if a greater amount is prescribed by regulation, the amount prescribed”.⁴

2. Differences in timeframes on key process steps

All the security of payments legislative regimes operating throughout Australia have been designed to provide for the rapid adjudication of disputed payment claims. Nonetheless there are significant differences in relation to key timelines.

Chapter 8 of the Senate Inquiry Report⁵ produced three tables (Table 8.1, 8.2 and 8.3 – reproduced at [Attachment A](#)) which highlight the differences between the various legislative regimes in respect to the:

- period within which a claimant may make a payment claim
- due date when a progress claim must be paid
- period within which a respondent must serve a payment schedule or (in the case of the West Coast Model) give the claimant a notice of dispute
- period within which a claimant may make an adjudication application
- period within which a respondent may lodge a response to the claimant’s adjudication application, and
- time frame within which an adjudicator is to make their adjudication determination or decision.

Question 4:

What should be the appropriate period in which a payment claim may be served under the Act?

Is allowing a claimant to make a claim up to 12 months after the construction work has been completed consistent with the prime objective of facilitating progress payments (and thereby improve cash flow)?

Claimants can have up to 12 months after completion of work to prepare a payment claim, while a respondent has a much shorter period to respond to a claim. Does this raise issues of procedural fairness and disadvantage to respondents?

Conversely, is the 3 month timeframe set out under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (Victorian Act) too restrictive? Is the 6 month timeframe set out under the *Building and Construction Industry Security of Payment Act 2009* (SA) (South Australian Act) more reasonable?

Should the legislation distinguish between a payment claim for a progress claim and a payment claim that is made as the final progress claim (as is the case under the Victorian Act)?

⁴ Refer to the Dictionary in Schedule 2 of the *Building and Construction Industry Payments Act 2004* (Qld).

⁵ op cit

Question 5:

What should be the due dates for payment of a progress payment?

Question 6:

Should there be different timeframes for when a payment claim becomes due and payable to a head contractor as opposed to when a payment claim becomes due and payable to a subcontractor?

Again there are major differences across jurisdictions as to when (in the absence of an express provision in the construction contract) a progress payment becomes due and payable.

Most jurisdictions that have adopted the East Coast Model (e.g. Queensland, ACT and Tasmania) provide a similar 'default' timeline for progress payments (i.e. 10 business days after the payment claim has been made). However, in South Australia the period is 15 business days.

Amendments made to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the NSW Act) in 2014 provide that a progress payment to be made by a principal to a head contractor becomes due and payable on the date occurring 15 business days after a payment claim is made under the Act. However, in the case of a progress payment to a subcontractor (other than a construction contract that is connected with an exempt residential construction contract), such payment becomes due and payable on the date occurring 30 business days after such a claim has been made.

The NSW amendments follow the recommendations of Bruce Collins QC in his final report on the *Independent Inquiry into Construction Industry Insolvency in NSW* (the Collins Report)⁶ for the creation of such a 'buffer' in the payment cycle. Collins QC said that such a buffer would:

"...give additional time to the head contractor who, by reason of its position standing in the middle of the contractual relationship, will then be able to benefit from additional time to pay its subcontractors, thus improving its own 'cash flow' position..."

The buffer proposal is designed to deal with what the inquiry has concluded is a widespread practice of robbing "Peter to pay Paul". This juggling act commences when a head contractor finds that it does not have sufficient money from within that particular project pyramid in order to pay the subcontractors who have already done the work and submitted their progress payment to it. In that event what is commonplace within the industry is for the head contractor to look to other jobs by way of going to what some contractors call their "treasury" for the purposes of writing a cheque. This would have the effect of disadvantaging any of the subcontractors in other project pyramids".⁷

Also relevant to this issue are the further recommendations made by Collins QC that the NSW Act should provide for contract terms to be void if payment to the head contractor is longer than 15 days, or if payment terms to subcontractors are longer than 28 days.⁸

⁶ Bruce Collins QC (2012), *Final Report: Independent Inquiry into Construction Industry Insolvency in NSW*, November 2012. Refer to <https://www.finance.nsw.gov.au/sites/default/files/IICII-final-report.pdf>

⁷ *ibid*, pp. 365-366

⁸ For example refer to s.11(1A) and s.11(1B) of the NSW Act. Also s.15(1)(a) and s.15(1)(b) of the *Building and Construction Industry Payments Act 2004* (Qld), which in turn refers to s.67U and s.67W of the *Queensland*

Question 7:

What should be the appropriate timeframe to be given to a respondent to provide a proper response to a claimant's payment claim and provide a payment schedule?

Under the East Coast Model the failure to provide a payment schedule within the prescribed time period will result in the respondent becoming liable to pay the claimed amount on the due date.

As identified earlier, claimants are generally given significant time in which to prepare their payment claim (in the case of many jurisdictions, up to 12 months), whereas a much shorter time is given for respondents to respond to the payment claims served on them.

The purpose of the legislative regime is to provide for prompt payment of claims for progress payment and therefore many have argued that respondents should be expected to indicate their position regarding the payment claim within 10 business days of being served with such claim.

However, sometimes respondents feel that a claimant has 'ambushed' them and that they should be provided with more time to respond than the 10 business day period commonly prescribed in most of the legislative regimes. This is particularly the case where the payment claim includes a large number of variation claims and/or claims for delay costs, and involves large amounts of money.

Question 8:

What should be the appropriate timeframe to be given to a claimant for the lodgement of its adjudication application?

Most of the legislative regimes that have adopted the East Coast Model provide for a similar time frame for the lodgement of adjudication applications (i.e. within 10 business days after the service of the payment schedule, or within 20 business days if the respondent has failed to pay the whole or part of the scheduled amount by the due date of payment).

However the lodgement period given under the legislative regimes that have adopted the West Coast Model is significantly greater, particularly in the case of the Northern Territory (refer to the first column of Table 8.3 in [Attachment A](#));

Question 9:

What should be the appropriate time frames to be given to a respondent to prepare its response to the claimant's adjudication application?

Respondents should have sufficient time to respond to material claimants provide in support of the payment claim, which sometimes contain extensive material including detailed expert reports. Some jurisdictions including Queensland and Victoria permit respondents to include additional reasons for withholding payment in their adjudication response, which the respondent had not included in its payment schedule.

Building and Construction Commission Act 1991 (Qld) (QBCC Act). Section 67U of the QBCC Act makes void in any construction management contract, payment terms of greater than 15 business days and s.67W makes void in any commercial building contract, payment terms greater than 15 business days.

In considering the appropriate timelines for a respondent to respond to an adjudication application, should greater flexibility be introduced—as is the case in Queensland—to provide for different timeframes depending on whether the claim is a ‘standard’ or a ‘complex’ claim?

Question 10:

What should be the default period within which an adjudicator is required to make a determination or decision?

Across Australia, the timeframe in which an adjudicator is required to make a determination varies:

- In NSW and Victoria it is within 10 business days of the adjudicator’s acceptance of appointment.
- In the case of South Australia, Tasmania, Northern Territory and the ACT it is 10 business days after receiving the respondent’s adjudication response.
- In Queensland, in respect of a ‘standard’ claim it is 10 business days after receiving the respondent’s adjudication response. Where the claim is a ‘complex’ claim, the default period is 15 business days after receiving the respondent’s adjudication response or, if the claimant has given a reply, then 15 business days after such reply had been received.
- In Western Australia it is 14 days from the date of service of the respondent’s adjudication response.

3. The process for appointment of adjudicators

Question 11:

What should be the process for appointment of adjudicators?

In Victoria, NSW, South Australia, ACT and Tasmania, adjudicators are appointed by accredited authorised nominating authorities (ANAs), whereas in Queensland that role is carried out by the Queensland Building and Construction Commission (QBCC) Registrar.

In Western Australia and the Northern Territory, the parties are permitted to agree and nominate in the contract either the appointing body or an accredited adjudicator to which an adjudication application is to be submitted.

Concern has been expressed with the East Coast Model that it allows a claimant to choose which ANA an adjudication application may be lodged with. Some believe that giving only the claimant the right to choose the ANA encourages a practice of ‘adjudication shopping’ (i.e. the claimant chooses an ANA whose panel of adjudicators is perceived to be ‘claimant friendly’). A system that allows ANAs which are privately owned and run on a for-profit basis may create a perception that such bodies will appoint adjudicators who will favour claimants. In addition, the relationship that some ANAs are alleged to have established with claims-preparers enhances the perception that some ANA’s are “claimant friendly”.

The Collins Report⁹ recommended that the NSW Act be amended to remove the right of a claimant to choose “*its own adjudicator*”¹⁰, which presumably was intended to refer to the claimant’s right to choose an ANA.

The Wallace Report¹¹ expressed the view that in-sourcing the role of an ANA to the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA) Registrar would “*remove many, if not all of the perceptions of conflict of interest and apprehended bias*”. Mr Wallace’s recommendation was accepted when the Queensland Government enacted the 2014 amendments and abolished the role and functions of the ANAs.

The South Australian *Review of the Building and Construction Security of Payment Act 2009*, undertaken by retired District Court Judge Moss (Moss Report),¹² recommended that the Minister withdraw all authority from the current ANA’s and appoint the Small Business Commissioner to be the sole person discharging the functions currently being carried out by the ANAs.

In response, ANAs argue that any analysis of the statistical data does not support the allegation that they are biased towards claimants. ANAs also contend that they provide a valuable free advisory service to all parties involved in the adjudication process and that abolishing ANAs will severely disadvantage subcontractors. In this regard, ANAs refer to the sharp increase in the ‘fall-over’ rate¹³ of adjudication applications in Queensland since the introduction of the 2014 amendments. ANAs contend that since the Registrar took over the function of the ANAs there has been in a loss of confidence in the operation of the BCIPA, with the result that the number of applications in Queensland have declined significantly. The Queensland Registry disputes this.

4. Quality of Adjudication Decisions

Question 12:

What is your experience regarding the quality of adjudication decisions?

Question 13:

Should legislation set out minimum requirements for the eligibility to become an adjudicator?

An adjudicator is required to make a decision within a compressed time frame. Some adjudications are relatively straight forward and can comfortably be determined within the usual 10 business day period prescribed under most legislations. However, it is not uncommon for adjudications to involve complex legal and technical issues and consideration of large volumes of written material. It is, therefore, not unreasonable to expect adjudicators to be suitably qualified.

⁹ op cit

¹⁰ Refer to last bullet point of Recommendation 39 at p. 369

¹¹ op cit

¹² Alan Moss (2015), *Review of the Building and Construction Security of Payment Act 2009*, May 2015. Refer to www.sasbc.sa.gov.au/files/542_review_of_building_and_construction_industry_security_of_payments_act_2009_prepared_by_alan_moss.pdf

¹³ The reference to the fall-over rate refers to those adjudication applications that are withdrawn because the claimant has made errors in drafting the payment claim and/or the adjudication application and therefore the application does not comply with the requirements of the BCIPA.

In South Australia, section 6 of the *Building and Construction Security of Payment Regulation 2011* expressly sets out the eligibility requirements of adjudicators in relation to educational and professional qualifications.

A similar provision setting out mandatory qualifications of registered adjudicators is included in regulation 9 of the *Construction Contracts Regulations 2004 (WA)*.

In NSW the Collins Report recommended¹⁴:

- “...there should be instituted a more intensive and detailed training course to be successfully completed before any person can qualify to act as an adjudicator and exercise functions under SOPA.
- Adjudicators; training and refresher courses should be devised and conducted by an independent neutral and competent body qualified ..., such as the Institute of Arbitrators and Mediators Australia.”

The Collins Report also suggested recommended modules for training ANAs, including: analysis of the Act; overview of contract and building and construction law; and analysis of contracts, costs, claims and entitlements in the building and construction industry.¹⁵

The Wallace Report endorsed the recommendation of the Collins Report, but included the subject of the study of “judicial ethics”. Mr Wallace expressed the view that the:

“...parties, industry and the public at large have an entitlement to expect that not only will the appointed adjudicator have the requisite skills, knowledge and experience to properly deal with the issues at hand, but that they will exhibit and act with the utmost integrity, independence, diligence, equality and impartiality not dissimilar to those expected of a tribunal member or a judge”¹⁶

5. Exclusion of claims

Question 14:

Should certain claims be excluded or carved out from the Act?

Under the Victorian Act, certain claims, such as those relating to latent conditions, time related costs and a (defined) class of disputed variations, are treated as “*excluded amounts*”¹⁷ The rationale for introducing these exclusionary provisions was to enable the Act to deal with non-complex disputes in an expeditious manner.

In particular, the manner in which a progress claim that includes a claim for variation work is to be treated under the Victorian Act is unique. Although the language set out in s.10A of the Act has been described as “tortuous”,¹⁸ the statutory mechanism can be summarised as follows:

¹⁴ op cit, recommendation 40 (p.370)

¹⁵ ibid

¹⁶ op cit, p.255

¹⁷ Refer to s.10A and s.10B of the Victorian Act

¹⁸ Refer to Vickery J in *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC631

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

The rationale for excluding variation claims where the value of the construction contract exceeds \$5 Million and where the contract contains a method for resolving disputes was given by the (then) Minister in his Second Reading speech when introducing the 2006 amendments, as follows:

“Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme.

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

Thus, where the parties have entered into a contract greater than \$5 Million and where the contract includes a mechanism for the resolution of disputes—such as whether the claimed work constitutes a variation or what value is to be given to the claimed variation work—then such disputes are excluded from the Victorian Act. The parties are left to pursue such claims under the agreed mechanism set out under the contract (e.g. arbitration expert determination etc.).

However, if the contract does not include such a mechanism, then the claimant can have such claims referred to adjudication under the Victorian Act. The default provision allowing a claimant to refer its disputed variation claim to adjudication in circumstances where the contract contains no mechanism for resolving disputes is intended to ensure that a claimant will not be allowed to fall through the cracks and left without a venue for having such a dispute being determined.

However, most construction contracts over \$5 Million do include a provision/mechanism for resolving disputes and this may perhaps explain why the take-up of applications under the Victorian Act (relative to other jurisdictions) have been low.

There is some concern that the exclusions of certain claims from the operation of the Victorian Act has placed subcontractors under financial stress because it is forcing them to pursue their claims for excluded amounts through processes other than the Act (such as litigation or arbitration).

6. Claims after termination of contract

Question 15:

Should legislation be amended to allow a reference date to accrue following termination of the contract?

There have now been a number of cases which have determined that reference dates do not accrue following termination of contract.¹⁹

Further, in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd*²⁰ the High Court of Australia held that a reference date is an essential prerequisite to the making of a valid payment claim. Therefore, in circumstances where the subcontractor's works have been taken out of the hands of the subcontractor, and the contract provides that all further obligations to pay the subcontractor are suspended until completion of the works, the subcontractor is not able to make a payment claim under the security of payments legislation after the date when such works were taken over.

Similarly, a claimant is not able to make a valid payment claim because no reference date arises after the date of termination if the contract has been validly terminated (e.g. by the subcontractor construing the taking over of its works as a repudiation of the contract) or the contract has been terminated under a termination for convenience clause.

These recent court cases raise two competing policy issues. First, a contract may expressly entitle a party to take over the works of the other party (because, for example the contractor has formed the view that the subcontractor has failed to perform its obligations in accordance with the requirements set out in the contract). In such circumstances payments should be suspended until the taken-over works have been completed (thereby ensuring that the contractor is not left out of pocket if the costs of completing the work exceeds whatever amount might otherwise be owing to the subcontractor).

Second, the suspension of payment has the potential to severely impact the cash flow of the subcontractor, particularly in circumstances where the termination may be regarded as having been "contrived" (i.e. a party using a termination for convenience clause within a construction contract so as to avoid its payment obligations under the Act). On this matter, the Wallace Report expressed the following view²¹:

"The concern that I have with respect to the decisions in Walton and now Mc Nab is that an unscrupulous contracting party may wait right up to the point just before the reference date prior to practical completion and could terminate the contract for any number of valid reasons, leaving the contracted party unable to claim under the BCIPA for the work performed since the last progress claim.

¹⁹ Refer to *Walton Construction (QLD) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors* [2011] QSC 67; *McNeal NQ Pty Ltd v Walkrete Pty Ltd & Ors* [2013] QSC 128; *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269; *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSW SC 1413.

²⁰ [2016] HCA 52

²¹ *op cit*, p. 269

In my view this is a matter that the Legislature should clarify. That is, in circumstances where a contract has been terminated, a claimant retains the statutory entitlement to serve a payment claim. I would however place one qualification on such a recommendation and that is that the claimant should be restricted to making one final payment claim for the construction work carried out up to the time of termination. This should also enable the claimant to claim for any retention monies or the return of security”

The Wallace Report²² did not however accept the proposition that the Queensland Act should be amended so as to void a termination for convenience clause as this would be an unacceptable intrusion on the rights of the parties to enter into a contract on agreeable commercial terms.

7. Impact of Contract Time-Bars

Question 16:

Should time bars that operate to exclude a contractor/subcontractor’s right to claim for an extension of time (“EOT”), delay costs and/or variations be codified? If so how? For example, should contractual terms which set an unreasonable time frame for notification of EOT or for notification of variations, be stated to be void?

Question 17:

On what basis should such timeframes to be regarded as unreasonable?

Question 18:

Should legislation prescribe a time period for the giving of such notices (such as, say 10 or 20 business days) so as not to deprive a contractor / subcontractor’s right to make such claims?

All jurisdictions that have adopted the East Coast Model include a provision within the legislation which states that a contractual provision is void to the extent that it excludes, modifies or restricts the operation of the Act, or purports to do so, or may reasonably be construed as an attempt to deter a person from making a claim under the Act.²³ There have been a number of cases that have considered how this section of the Act is to be interpreted.²⁴

The issue of the effect of a time bar provision within a contract and whether such provision offends the “no contracting out” section of the legislation was considered in *John Goss Projects Pty Ltd v Leighton Contractors* [2006] NSWLR 707 where the Hon Justice McDougall held that the particular clause within the contract was not inconsistent with the Act:

“Provided notice is given in accordance with clause 45 the work that is the subject of the notice may be included in a payment claim made at any time, subject of course to the general provisions of the Act relating to progress claims and their contents”.

The issue of time bars within a contract raises a range of competing interests. On the one hand a party should be entitled to receive timely notification of what claims it may face and not be

²² op cit, p. 270

²³ For example, refer to s.34 of the NSW Act, s.99 of the Queensland Act, or s.34 of the Victorian Act.

²⁴ Refer to *State of Queensland v T & M Buckley Pty Ltd* [2012] QSC 265; *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC214; *Lean Field Developments Pty Ltd v E & E Global Solutions (Aust) Pty Ltd* [2014] QSC 293; and *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218).

confronted with a subcontractor presenting such claims many months after the subcontractor has completed its work.

On the other hand, it appears unjust to deprive a party of a significant right to submit EOT/delay cost claims because of failure to submit written notice within an unreasonable time frame set out in some contracts, and particularly in circumstances where the other party may not have incurred any significant detriment (and even if the common law tests relating to penalties and estoppel are not met).

The Wallace Report²⁵ declined to recommend that the Queensland Act be amended so as to set mandatory minimum timeframes for the notification of extension of time claims or for variation claims because “*the ‘one size fits all’ approach does not cater for the gulf of different size and complexity of claims that are currently utilising the BCIPA’.*”

8. Endorsement of Payment Claim

Question 19:

Should all payment claims include the endorsement that “this is a payment claim made under the Act”?

Question 20:

Should such payment claims outline the period in which to respond and the potential consequences?

In 2014, the amendments to the NSW Act removed the requirement for a payment claim to be endorsed with the words that the claim was a claim made under the Act. This has had the effect of making any claims (including a claim made under the contract) a claim made under the Act, thereby requiring the recipient of such a claim to provide a payment schedule. It has also exposed claimants to the potential risk of inadvertently having been taken to have made a claim under the Act when in fact they only intended the claim to have been made under the contract—and also potentially having served more than one payment claim for each reference date contrary to s.13(5) of the NSW Act.

Requiring a payment claim to include warnings regarding response times and the potential consequences of non-compliance could assist the recipient of such claims to be aware of their rights and the consequences should no payment schedule be provided.

9. Publication of Adjudicators’ Determinations

Question 21:

Should an adjudicator’s decision/determination be published online?

Adjudicators’ decisions/determinations have been published online in Queensland for many years. However, there are two views regarding the publishing of an adjudicator’s decision/determination. Some argue that the publication increases transparency. Others argue that the publication of what is essentially a commercial dispute between two parties should be kept private, much like decisions made by arbitrators or under an expert determination.

²⁵ op cit, p.262-263

10. Court's power to sever and remit

Question 22:

Should the legislation provide the Courts with the power to sever that part of the adjudicator's determination/decision that is declared void but with the balance to remain an enforceable determination/decision?

Some stakeholders suggest remitting part of an adjudicator's determination, which contains a non-jurisdictional error, back to the original adjudicator rather than allow the entire decision to be set aside. Such an approach would obviate the need for the claimant to restart the entire process by making a fresh application, and enable the matter to be dealt with in a more expeditious and cost effective manner.

In *BM Alliance Coal Operation v BGC Contracting Pty Ltd*²⁶ the Queensland Court of Appeal held that where an adjudicator's decision was void as a result of a jurisdictional error then the Court was not entitled to seek orders severing discrete elements of a decision so as to preserve the remainder.

In *Richard Cordukes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)*²⁷, the Hon Justice McDougall analysed recent case law where, upon a determination being quashed, the courts remitted the adjudication application to the adjudicator for further consideration. His Honour observed, however that those cases involved the adjudicator having made errors of law of a non-jurisdictional nature. Clearly where the error was of a jurisdictional nature there "*is no point in remitting the matter, because the outcome is necessarily determined by the quashing order*".²⁸

Recommendation 28 of the Wallace Report²⁹ recommended that the Queensland Act be amended to expressly permit the Court, where appropriate, to sever part of an adjudication decision that is affected by jurisdictional error, and in the process confirm that the balance of the adjudication decision remains enforceable. This recommendation was taken up in the 2014 amendments to the Queensland Act.³⁰

11. Statutory Trusts to further protect subcontractors

Question 23:

Should consideration be given to the establishment of a statutory construction trust, and should such trusts apply to all monies owed or confined only to retention monies?

This is one of the most controversial issues but there has been an emerging recognition that governments should consider introducing further reform to protect subcontractors.

The Law Reform Commission of Western Australia in its 1998 report on *Financial Protection in the Building and Construction Industry*³¹ identified a range of benefits associated with a trust scheme.

²⁶ [2013] QCA 394 - Per Muir JA at [71]

²⁷ [2016] NSWSC 1129

²⁸ At [73]

²⁹ op cit

³⁰ Refer to s.100(4)

³¹ Law Reform Commission of Western Australia (1998), *Financial Protection in the Building and Construction Industry*, March 1998, pp 52-53. Refer to www.lrc.justice.wa.gov.au/files/P82-R.pdf

In 2003 the Cole Royal Commission³² made a finding that a trust fund had considerable merit in ensuring subcontractors get paid monies for which they are entitled and, whilst Commissioner Cole did not recommend the establishment of a trust model, he nevertheless emphasised that *“this should not be taken to be recommending against the model”*.

The Collins Report recommended³³ the establishment of a statutory construction trust to apply to all building projects valued at \$1M or more.

The Wallace Report recommended³⁴ that monies held on retention, and other forms of security, should be held under a Construction Retention Bond Scheme. In December 2016 the Queensland Government announced that it is in the process of introducing a suite of amendments that will include the introduction of Project Bank Accounts (PBA’s) to start from 2018 on all Queensland Government projects between \$1 million and \$10 Million, and from 1 January 2019, on all construction projects over \$1 Million.

In 2014, the NSW Government introduced regulations to apply to contracts between head contractors and subcontractors for non-residential projects over \$20 Million, requiring head contractors to deposit subcontractor’s retention moneys into *“approved accounts with authorised deposit-taking institutions”*.

In June 2013 the Western Australian Government announced it would trial PBA’s on construction projects managed by the Department of Finance, Building, Management and Works. As from 30 September 2016, the Western Australian Government has mandated PBA’s on Government projects valued over \$1.5 Million and involving one or more subcontractors. Further, the WA Government will also develop a Code of Conduct for contractors working on state government projects requiring adherence to existing laws.

The New Zealand Government introduced changes to its *Construction Contracts Act 2002* (NZ) in 2015 which provide that as of 31 March 2017, retention moneys withheld under a construction contract must be held in trust.

A number of states in the USA, provinces of Canada and the United Kingdom have also established trust schemes.

The Senate Inquiry recommended that the Commonwealth undertake a two year trial of PBA’s on 20 construction projects where the Commonwealth’s funding of the project exceeds \$10 Million.

³² op cit, Volume 8, Part 2, p. 250

³³ op cit, Recommendation 6

³⁴ op cit, Recommendation 11

12. Adjudication for domestic construction

Question 24:

Should the adjudication system be extended to include the housing sector so as to enable a contractor/builder to make a progress payment claim against an owner–occupier?

Question 25:

Can such a domestic adjudication process operate under the same rapid adjudication scheme that operates in the commercial sector of the building and construction industry?

Currently the majority of the security of payments laws do not enable builders who carry out construction work in the residential sector to make a statutory payment claim against an owner-occupier, even though sub-contractors who carry out work on the same project can make such claims against the builder. With the exception of Tasmania, governments have been reluctant to extend the operation of the security of payments legislation to enable claims to be made against mum-and-dad owner-occupiers.

Should a domestic adjudication scheme be incorporated into security of payments legislation covering the commercial sector, or should such a scheme fall under a separate legislative regime, with appropriate safeguards to protect home owners?

13. Special mechanism for small business

Question 26:

Should the security of payment laws be enhanced so as to provide small business with other dispute resolution mechanisms?

Question 27:

Does security of payments laws provide an effective or suitable mechanism for dealing with small claims?

Question 28:

Do the costs associated with adjudications deter applications from small parties?

The *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)* by Professor Philip Evans³⁵ specifically considered this issue and concluded that the objectives of the *Construction Contracts Act 2004 (WA)* would not be significantly improved by amendments to the Act, or associated legislation which create separate dispute resolution services provided by the WA Building Commission.

Most ANAs also provide adjudications for small payment disputes at a fixed fee.

³⁵ Professor Philip Evans (2015), *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*, August 2015.

14. Acts of intimidation and retribution

Question 29:

How should acts of intimidation and retribution in relation to the use of security of payments legislation be handled?

Various previous reviews have considered the anecdotal evidence of contractors threatening subcontractors that if they invoke their statutory rights and make a payment claim they will face retribution (i.e. not receive any further work).

In its Report, the Senate Committee expressed the following view:

“9.34 *The Committee is very concerned at evidence put to the inquiry that participants in the construction industry face intimidation and retribution from principal contractors when seeking to enforce their rights under SOP Acts. This is anathema to an open and competitive industry. The Committee considers that regulators and government departments and agencies responsible for the SOP Acts need to take a more proactive role in ensuring that all participants in the Australian construction industry are comfortable relying on their statutory rights.*

9.35 *The Committee appreciates that procurement may be a powerful tool to reduce intimidation in the industry. However, the Committee is concerned that this approach raises significant issues of procedural fairness. Therefore, the Committee considers that the better approach may be to reform SOP Acts to make it a criminal offence to intimidate individuals who seek to rely on their rights under the Act”.*

Attachment A – Jurisdictional differences in timeframes for key process steps

Table 8.1: Making a progress claim and entitlement to be paid under the Security of Payments Acts

Jurisdiction	When may a payment claim be served?	When must a progress claim be paid?
NSW	Up to 12 months after relevant construction work carried out. ³⁶	To subcontractor: 30 days after payment claim made ³⁷ To head contractor: 15 days ³⁸
Vic	Up to 3 months after relevant construction work carried out ³⁹	Within 20 business days after construction work carried out ⁴⁰
Qld	Within 6 months after the relevant construction work carried out ⁴¹	10 business days after a payment claim is made ⁴²
SA	Within 6 months after the relevant construction work carried out ⁴³	15 days after a payment claim is made ⁴⁴
Tas	Up to 12 months after relevant construction work carried out ⁴⁵	10 days after a payment claim is made (for all construction work other than home building) ⁴⁶
ACT	Up to 12 months after relevant construction work carried out ⁴⁷	10 days after a payment claim is made ⁴⁸
WA	Can be made any time after contractor has performed any of its obligations ⁴⁹	50 days after construction work carried out ⁵⁰
NT	Can be made any time after contractor has performed any of its obligations ⁵¹	28 days after construction work carried out ⁵²

Source: Senate Economic References Committee (2015), *Insolvency in the Australian Construction Industry*, December 2015, p.128.

Note: In the above Table 8.1 the reference to the Victorian Act prescribing that the due date of payment of a progress claim being within 20 business days after construction was carried out, is incorrect. Section 12(1) of the Victorian Act provides that a progress payment becomes due and payable:

³⁶ *Building and Construction Industry Security of Payment Act 1999* (NSW), s 13(4)(b)

³⁷ *ibid*, s 10(1B)

³⁸ *ibid*, s 10(1A)

³⁹ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 14(4)(b)

⁴⁰ *ibid*, s 9(2)(b)

⁴¹ *Building and Construction Industry Payments Act 2004* (Qld), s 17A(2)(b)

⁴² *ibid*, s 15(1)(b)

⁴³ *Building and Construction Industry Security of Payment Act 2009* (SA), s 13(4)(b)

⁴⁴ *ibid*, s 11(1)(b)

⁴⁵ *Building and Construction Industry Security of Payment Act 2009* (Tas), s 17(6)(b)

⁴⁶ *ibid*, ss 15(2) and 19(3)

⁴⁷ *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 16(4)(b)

⁴⁸ *ibid*, s 13(1)(b)

⁴⁹ *Construction Contracts Act 2004* (WA), s 16; Schedule 1, Div 3, cl. 4(1)

⁵⁰ *ibid*, s 10

⁵¹ *Construction Contracts (Security of Payments) Act* (NT), s 19; Schedule 1, Div. 3, cl. 4(1)

⁵² *ibid*, s 13

- On the date on which the payment becomes due and payable in accordance with the terms of the contract; or
- If the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim has been made under the Act.

Table 8.2: Timeline for response to progress payment claim under the Security of Payments Acts

Jurisdiction	When must a respondent serve a payment schedule (or give the claimant a notice of dispute)?
NSW	Within 10 business days after the payment claim is served. ⁵³
Vic	Within 10 business days after the payment claim is served. ⁵⁴
Qld	For standard payment claim (under \$750,000): 10 business days after payment claim is served. ⁵⁵ For complex payment claim (over \$750,000): (i) If claim served on respondent within 90 days after construction work completed, 15 business days after payment claim is served. ⁵⁶ (ii) If claim served on respondent more than 90 days after construction work completed, 30 business days after payment claim is served. ⁵⁷
SA	Within 15 business days after the payment claim is served. ⁵⁸
Tas	For home building: 20 business days after payment claim is served. ⁵⁹ For all other construction: 10 business days after payment claim is served. ⁶⁰
ACT	Within 10 business days after the payment claim is served. ⁶¹
WA	If respondent disputes claim must serve notice within 14 days and pay non-disputed part within 28 days. ⁶² If no dispute, respondent must pay within 28 days. ⁶³
NT	If respondent disputes claim must serve notice within 14 days and pay non-disputed part within 28 days. ⁶⁴ If no dispute, respondent must pay within 28 days. ⁶⁵

Source: Senate Economic References Committee (2015), *Insolvency in the Australian Construction Industry*, December 2015, p.129.

⁵³ *Building and Construction Industry Security of Payment Act 1999* (NSW), s 14(4)

⁵⁴ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 15(4)

⁵⁵ *Building and Construction Industry Payments Act 2004* (Qld), s 18A(2)(b)

⁵⁶ *ibid*, s 18A(3)(b)(i)

⁵⁷ *ibid*, s 18A(3)(b)(ii)

⁵⁸ *Building and Construction Industry Security of Payment Act 2009* (SA), s 14(4)(b)

⁵⁹ *Building and Construction Industry Security of Payment Act 2009* (Tas), s 19(3)(a)

⁶⁰ *ibid*, s 19(3)(b)

⁶¹ *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 16(4)(b)(ii)

⁶² *Construction Contracts Act 2004* (WA), s 17; Schedule 1, Div 5, cl. 7(1)

⁶³ *ibid*, s 17; Schedule 1, Div 5, cl. 8(3)

⁶⁴ *Construction Contracts (Security of Payments) Act* (NT), s 20; Schedule 1, Div. 5, cl. 6(2)(a)

⁶⁵ *ibid*, s 20; Schedule 1, Div. 5, cl. 6(2)(b)

Table 8.3: Adjudication timelines under the Security of Payments Acts

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for Adjudication decision
NSW	10 or 20 business days after payment schedule or due date for payment passes depending on respondents action. ⁶⁶	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. ⁶⁷	Within 10 business days of notifying claimant and respondent of acceptance of application. ⁶⁸
Vic	10 business days after claimant receives payment schedule; If no schedule, no later than 17 business days after due date passes. ⁶⁹	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. ⁷⁰	Within 10 business days of notifying claimant and respondent of acceptance of application; with claimants agreement longer—but no longer than 15 business days. ⁷¹
Qld	10 or 20 business days after payment schedule; due date for payment passes; or notice of intention given, depending on respondents action. ⁷²	For standard claim: within 10 business days of receiving application; or 7 business days of receiving notice of adjudicator's acceptance of application; ⁷³ For complex claim: 15 and 12 business days respectively ⁷⁴ , with option of extending by 15 business days. ⁷⁵	For standard claim: 10 business days after receiving respondent's response For complex claim: 15 business days. ⁷⁶
SA	15 or 20 business days after payment schedule; due date for payment passes; or notice of intention given, depending on respondents action. ⁷⁷	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. ⁷⁸	Within 10 business days of respondent's response, or if no response—the date response is due. ⁷⁹

⁶⁶ *Building and Construction Industry Security of Payment Act 1999* (NSW), s 17(1)–(2)

⁶⁷ *ibid*, s 20(1)

⁶⁸ *ibid*, s 21(3)

⁶⁹ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 18(1)–(2)

⁷⁰ *ibid*, s 21(1)

⁷¹ *ibid*, s 22(4)

⁷² *Building and Construction Industry Payments Act 2004* (Qld), s 21(3)(c)(i)–(iii)

⁷³ *ibid*, s 24A(2)

⁷⁴ *ibid*, s 24A(4)

⁷⁵ *ibid*, s 25A(5)

⁷⁶ *ibid*, s 24A(5)

⁷⁷ *Building and Construction Industry Security of Payment Act 2009* (SA), s 17(3)(c)–(e)

⁷⁸ *ibid*, s 20(1)

⁷⁹ *ibid*, s 21(3)

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for Adjudication decision
Tas	10 or 20 business days after payment schedule or due date for payment passes depending on respondents action. ⁸⁰	Within 10 business days after receiving copy of the application; or 5 business days after receiving notice of adjudicator's acceptance of the application. ⁸¹	10 business days after receiving the respondent's response. ⁸²
ACT	10 or 20 business days after payment schedule or due date for payment passes depending on respondents action. ⁸³	Within 7 business days after receiving copy of the application; or 5 business days after receiving notice of adjudicator's acceptance of the application. ⁸⁴	10 business days after receiving the respondent's response. ⁸⁵
WA	28 days after the dispute arises. ⁸⁶	14 days ⁸⁷	14 days from date of service of the response ⁸⁸
NT	Within 90 days after the dispute arises ⁸⁹	Within 10 working days after being served. ⁹⁰	10 working days after receiving the respondent's response. ⁹¹

Source: Senate Economic References Committee (2015), *Insolvency in the Australian Construction Industry*, December 2015, p.130.

⁸⁰ *Building and Construction Industry Security of Payment Act 2009* (Tas), s 21

⁸¹ *ibid*, s 23(2)

⁸² *ibid*, s 24(1)

⁸³ *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 19(3)

⁸⁴ *ibid*, s 22(1)

⁸⁵ *ibid*, s 23(3)(a)

⁸⁶ *Construction Contracts Act 2004* (WA), s 26

⁸⁷ *ibid*, s 27

⁸⁸ *ibid*, s 31(1)

⁸⁹ *Construction Contracts (Security of Payments) Act* (NT), s 28(1)

⁹⁰ *ibid*, s 29(1)

⁹¹ *ibid*, s 33(3)