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ADJUDICATE TODAY RESPONSE TO REVIEW OF SECURITY OF PAYMENTS LAWS: ISSUES PAPER

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1. INTRODUCTION

1.1 This federal Review has impressively broad Terms of Reference for analysis of the six State and two Territory Acts which attempt to address security of payment or payment concerns in the building and construction industry. In common, the Acts claim to address a fundamental right of anyone that performs work in accordance with a contract to be paid without delay for the work they have done (the fundamental principle[1]).

1.2 Unfortunately, different State and Territory approaches to providing a statutory basis for recognising the fundamental principle have been mixed. From the initial basis established by NSW in 2000, and thoughtfully amended in 2002, States and Territories have all had a fiddle resulting in a myriad of differences, considerable confusion and varying degrees of diminishing industry support for the Acts.

1.3 Many of the recent amendments have been ill-conceived and are hardly consistent with the fundamental principle.

1.4 Respectfully, we view the unenviable task of the Review is to consider what is working best across the eight statutory jurisdictions and, with assistance from industry consultation, research and the Review's impressive knowledge and experience of the industry and Security of Payment regime, to make recommendations for the best way to achieve the fundamental principle across Australia.

1.5 Appropriately, the terms provide guidance as to the commencing point for this daunting task.

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

1.6 We do not view this term as restrictive. Rather it allows the broadest of considerations including "other models" that may have emerged internationally or are proposed through the review process and found by the Review to be aligned and consistent with the fundamental principle. However, specifically, of eight current Australian approaches, the terms highlight a model which no longer operates being "the model that operated in the Queensland jurisdiction prior to 2014."

1.7 We support the Review commencing from that model. Adjudicators, ANAs and others who widely practice across State borders and have experience with the different models share the general view that the Qld approach, prior to the unfortunate 2014 amendments, provides the closest legislative form to best achieve the fundamental principle.

1.8 This submission commences from a position of general support for the Qld model prior to the 2014 amendments and proposes improvements consistent with the fundamental principle.

1.9 In our experience, and backed by consultations with many of the most experienced adjudicators and other professionals working in the area, any model which, insofar as is constitutionally capable, replaces the eight jurisdictions and provides uniformity and consistency across Australia, together with a high degree of education and support to industry participants, will be successful.

1.10 Harmonised Security of Payment legislation should contain both specific objectives and a general statement of principles to assist courts interpreting the Act. The objectives and principles need not be complex and should recognise self-evident truths for those practising in the area. We consider this in Section 2 "Principles for harmonised federal Security of Payment legislation".

[1] Senate Economics References Committee "Insolvency in the Australian construction industry" at para 10.47: "In the view of the committee, there is one principle and one principle only that should be observed in relation to security of payment in the construction industry. It is a fundamental right of anyone who performs work in accordance with a contract to be paid without delay for the work they have done."

1.11 Adjudicate Today, together with our adjudicators and staff, is committed to providing the Review with every possible assistance to ensure its success. Subject to respecting the confidentiality of industry parties, our detailed database of determination/decisions is available for analysis by Review staff. If any of our proposals are unclear or would benefit from closer analysis or workshopping, we would be most appreciative of the opportunity to engage with you further.

1.12 We take this opportunity of acknowledging and thanking you for attending the annual Adjudicate Today adjudicator's seminar and participating in an open discussion with the 50 adjudicators.

1.13 This submission has been prepared with assistance from many adjudicators and with the benefit of our notes from the seminar. Each question which we address in this submission was subject to close scrutiny and one or more papers prepared by senior adjudicators. Our views have been road tested for practicality. However, the views in this paper are those of Adjudicate Today which is not necessarily the view of all our adjudicators. We take full responsibility for the contents and any errors or omissions.

1.14 Before we move to the specific questions, we set out our principles for harmonised security of payment legislation against which we support recommendations being measured.

2. PRINCIPLES FOR HARMONISED FEDERAL SECURITY OF PAYMENT LEGISLATION

2.1 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 can recover, progress payments and a final payment without delay in relation to the carrying out of the work and the supplying of those goods and services[2].

2.2 Cash flow is the life blood of the industry. Without the movement of funds as provided by contract, all parties face potential insolvency.

2.3 Improving cash flow and thereby reducing the risk of insolvencies requires focus on three separate albeit related issues.

2.3.1 Persons who undertake construction work or provide related goods or services to have a statutory right to apply for adjudication of payment claims. The purpose of this is to provide rapid resolution of disputed payment claims.

2.3.2 An efficient and effective scheme for accreditation, registration and appointment of adjudicators. This purpose is to ensure integrity and efficiency of the adjudication process.

2.3.3 Moneys paid for construction work or related goods or services to be held in trust on behalf of persons lower in the contract chain who have performed the construction work or provided the related goods and services. The purpose of this is to ensure money owed for construction work or related goods and services remains available and is not misappropriated.

2.4 Adjudication must be:

2.4.1 Quick - so money can flow in the industry to persons who perform construction work or provide related goods and services. This can be achieved by strict timeframes established by the Act and processes which are practical and suited to the building and construction industry. Speed should not be governed by the sum involved rather an adjudicator should have a limited capacity to extend their statutory time frame to determine/decide (decide) an application to best suit situations.

2.4.2 Mandatory - for parties to participate within a strict framework. If the claimant fails to comply with the strict timeframes and procedures of the Act, the application is invalid. If the respondent fails to comply, the right to have a response to the adjudication application considered by the adjudicator is forfeited. These are 'all-in provisions'.

2.4.3 Supportive - of parties. Advice must be freely and professionally available to parties on the legislative procedures and coverage prior to, during and after the conclusion of adjudication. Parties to adjudication must have access to external third party professional support (Authorised Nominating Authorities - ANAs) if they are not to be severely disadvantaged by the strict timeframes, procedures (the all-in provisions) and ambit of the Act.

2.4.4 Enforceable - as a statutory debt in the courts. Issuance of adjudication certificates by ANAs is most effective. Payment into court before an application to set aside an adjudication determination/decision (decision) should be made.

[2] Derived from Building and Construction Industry (Security of Payment) Act 1999 (NSW), s 3(1)

2.4.5 Transparent - as to the reasons parties withhold payment. Other than issues going to jurisdiction based on late lodgement of an adjudication application, reasons for withholding payment that were not included in the payment schedule should not be permitted to be added in the adjudication response.

2.4.6 Cost effective - other than the high cost of complex matters in Qld, the average cost of adjudication is approximately 5% of processing a similar matter through the courts. Parties should share fees unless the adjudicator decides otherwise.

2.4.7 User friendly - simple to understand. Courts have unnecessarily complicated the original framers vision of adjudication as a variant of independent certification of who holds the money if parties wish a continuing contest over a payment dispute.

2.4.8 Educative – of industry parties as to their rights and obligations. Conditions of Authorisation as an ANA should be extended to requiring a continuing education role to industry parties.

2.4.9 Protective - of contractual abuse. E.g. void pay when paid provisions; ill-defined due date for payment provisions; statutory right to make progress payment claims.

2.4.10 Adjudicators must be:

2.4.10.1 Well trained - with professional backgrounds of practice in or associated with the building and construction industry.

2.4.10.2 Multi-disciplined - most will hold two or more tertiary qualifications.

2.4.10.3 Independent - of parties.

2.4.10.4 Without conflict of interest - have no financial interest in the outcome of adjudication or any conflict of interest at all.

2.4.10.5 Capable - of determining the volume of matters consistent with maintaining their skill set.

2.4.10.6 Registered with ANAs - that have passed rigorous government mandated tests and oversight as to independence, integrity and processes.

2.5 Statutory (deemed) trusts are the answer to misappropriation of moneys paid for work done by persons lower in the contract chain in the building and construction industry. Project bank accounts are useful on the journey towards statutory trusts but do not by themselves present a complete solution.

3. **QUESTION 1 – Do you consider 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?**

3.1 The history of the legislative models has been well documented and doesn't require repetition here. Generally, in Australia, there are two readily definable models.

3.2 The Australian (sometimes called the East Coast model) representing New South Wales (NSW), South Australia (SA), Tasmania (Tas), Australian Capital Territory (ACT), and Queensland (Qld) prior to the 2014 amendments. These schemes were initially based on the NSW 1999 Act.

3.3 Due to substantial amendments, there are two sub-sets:

3.3.1 Qld, post the 2014 amendments; and

3.3.2 Victoria.

3.4 West Coast model, representing Western Australia (WA) and NT (NT). These schemes are roughly aligned with the United Kingdom (UK) model which is found in the Housing Grants, Construction and Regeneration Act 1996 (UK)[3].

3.5 The implementation in five States and one territory make the Australian model easily the predominant legislative model. There are many differences between the models and we highlight a few.

3.6 The Australian model was specifically designed and conceived to address cascading insolvency by ensuring a mechanism that supported cash flow down the contracting chain. In the second reading speech, the then Minister for Public Works and Services, Mr Iemma (subsequently Premier) stated in the second reading of the Bill on 29 June 1999:

> *… The Building and Construction Industry Security of Payment Bill is a key component of the Government reform package for security of payment in the New South Wales construction industry. It follows the 15 February announcement by the Premier of the Government's intention to stamp out the unAustralian practice of not paying contractors for work they undertake on construction. 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.*
> *The Government is determined to rid the construction industry of such totally unacceptable practices. The Government recognises that any action taken to achieve this should not add unnecessary cost to industry, its participants and clients. An exposure draft bill, on which this proposed legislation is comprehensively based, was issued for public comment by the Premier on 15 February 1999 as part of a package of reforms. ...*

[3] The relevant parts of the Act are found in sections 104 – 117.

3.7 Further the Australian model was implemented before the West Coast model and has had many thousand more matters decided. The model allows a natural path of escalation with the requirement that prior to the Act being engaged a claim must be issued that names the Act[4]. This allows a subordinate contractor to issue ordinary invoices for much of the works and place the endorsement on later claims if they are concerned about payment being denied. In clear distinction to the West Coast model, the Act only operates up the contracting chain so that a subordinate contracting party can claim against a party that contracted for work to be performed[5].

3.8 Under the Australian model, the process is commenced by the issue of a payment claim, and these can occur regarding each and every claim for payment during the contract works. This has the clear benefit of requiring the issue of a payment schedule from the superior contracting party. A payment schedule is clearly defined by each of the Australian model enactments[6] and must:

3.8.1 Identify the payment claim to which it relates,

3.8.2 Indicate or state the sum intended to be paid, and

3.8.3 If the sum to be paid is less than that claimed to provide the reasons for that assessment.

3.9 This is a level of information which was not previously provided. Even where a contract may have required the superior contracting party to provide such information either directly or through the superintendent, this was rarely provided. Non-compliance, prior to the Act, had no real consequence as enforcement of the right to payment required court or arbitral enforcement and the reasons could be provided in the statement of defence in the relevant preliminary documents provided to the tribunal.

3.10 Additionally, the scheme proscribes the contract having a paid-if-paid or paid-when-paid provision. These contract clauses were an anathema to subordinate contractor cash flow. Effectively, if the superior contractor had failed in some aspect of its contract works, or merely failed to enforce its rights, no enforceable contractual right arose to make a payment to a subcontractor. The consequence was that a subcontractor may be the funding source for the work, as it is likely that each of the parties below the principal would be purchasing materials and providing labour with the only enforcement process for payment being slow and expensive litigation or arbitration.

3.11 Like both the UK model and the West Coast model, the Australian model allows for independent bodies to nominate the adjudicator. However, in clear distinction to the UK/West Coast model, the Australian model does not allow the adjudicator to be named in the contract. There are several reasons that the nomination is to be conducted by an independent body, as opposed to an agreed adjudicator. Principally, this is because the content of a detailed contract for works is often not extensively reviewed by subordinate contractors; often the subordinate contractors will merely accept the contract required by the superior party and may contain a large number of terms that are strongly against the interests of the subordinate contractor. Consider for example this provision of the standard contract AS 4908-2000 which is regularly amended as shown.

[4] This requirement was removed in NSW in April 2014, without sound reason or effective implementation. The implementation is ineffective as the endorsement is still required on the notice of election pursuant to section 17(2) of the Act.

[5] See Brodyn Pty Ltd v Y A Welding Pty Ltd [2006] NSWLC 25

[6] Section 14 in NSW and 18 in Qld

34.2 Notice of delay

~~A party~~ Upon the *Subcontractor* becoming aware of anything which will probably cause delay to *WUS*, the *Subcontractor* shall promptly give the ~~*Subcontract Superintendent*~~ *Main Contractor's Project Manager* ~~and the other party~~ written notice of that cause and the estimated delay.

and

34.3 Claim

Provided the *Subcontractor* has strictly complied with each and every requirement of clause 34.2 and this 34.3 the *Subcontractor* may ~~shall~~ be entitled to such extension of time for carrying out *WUS* (including reaching *practical completion*) as the ~~*Subcontract Superintendent*~~ *Main Contractor's Project Manager* assesses ('*EOT*'), if:

(a) the *Subcontractor* is or will be delayed in reaching *practical completion* by a *qualifying cause of delay*; and

(b) the *Subcontractor* gives the ~~*Subcontract Superintendent*~~ *Main Contractor's Project Manager*, within 7 ~~21~~ days of when the *Subcontractor* should reasonably have become aware of that causation occurring, a written claim for an *EOT* evidencing the facts of causation and of the delay to *WUS* (including extent); and

(c) the *Subcontractor* has taken all reasonable steps available to avoid or minimise the delay; and

(d) The cause of delay was not caused or contributed to by an act or omission of the *Subcontractor* or a breach of this *Subcontract.*

If further delay results from a *qualifying cause of delay* evidenced in a claim under paragraph (b) of this subclause, the *Subcontractor* shall claim an *EOT* for such delay by promptly giving the ~~*Subcontract Superintendent*~~ *Main Contractor's Project Manager* a written claim evidencing the facts of that delay.

If the *Subcontractor* fails to comply with each and every requirement of clause 34.2 and this clause 34.3 on time the *Subcontractor* will have no entitlement to an *EOT* in respect to any delay for which it may otherwise have been entitled to an *EOT* had it complied with the requirements of this clause.

3.12 These amendments example a time bar clause in which the time for making an Extension of Time (EOT) claim is reduced from 21 days under the unamended contract to 7 days. The amended clause also indicates, by inserting the word "may" instead of "shall", that the head contractor has discretion in awarding an EOT even if the subcontractor complies with the notice provisions and the 7-day time limit.

3.13 Here is another example.

34.9 No Delay damages

The *Subcontractor* accepts the risk of all increased costs or losses in relation to the execution of *WUS* resulting from delay or disruption in the execution of *WUS*. The *Subcontractor's* entitlement to an *EOT* contained elsewhere in the *Subcontract* shall be the *Subcontractor's* sole remedy for any delay or disruption in the execution of *WUS* whether caused by any act or omission of the *main contractor* or breach of the *Subcontract* by the *main contractor* or the negligence of the *Main Contractor* or howsoever otherwise caused.

~~For every day the subject of an *EOT* for a *compensable cause* and for which the *Subcontractor* gives the *Subcontract Superintendent* a claim for delay damages pursuant to subclause 41.1, damages certified by the *Subcontract Superintendent* under subclause 41.3 shall be due and payable to the *Subcontractor*.~~

3.14 These amendments example a head contractor amending the Australian Standard contract to remove the subcontractor's entitlement to delay damages (available under the unamended contract) even if the delay is caused by a breach of the subcontract by the head contractor or caused by the head contractor's negligence.

3.15 No sensible subcontractor should expose themselves to these types of contractual provisions. However, such contracts are signed every day in Australia. Provisions such as these are the underlying cause of the unfair contracts legislation recently passed[7].

3.16 Here is a screen shot from one subcontractor's website caught up with the M3 Site Projects Pty Ltd liquidation.

This is how it works;

- You contract to the builder
- You are extending him say, $500,000 of unsecured credit (could be a million)
- He gives you a 178 page contract to baffle you
- Contract has 14k per day liquidated damages in it and dozens of other unreasonable clauses
- He adds a further 10 pages of an indemnity and directors guarantees form to the contract
- Hahaha, jokes on you, **it's not him indemnifying or guaranteeing you** for the 500k of credit you are extending him. Don't be ridiculous, your just a shitty subbie working for the great one
- No, not at all, it's **you indemnifying him** against any monies owed or losses, LD's you might cause to the great one
- Then if your lucky, you might get paid a few times
- He then liquidates owing you 300k but because he has paid you 200k in the last 6 months, they say you may have to pay it back to the liquidator as preferential payments.

Sounds fair? No problem here with all that because that's what the industry offers us, it's normal, we are conditioned to it.

Why other bodies cannot see the injustice of that is totally beyond me. The only reason I can come up with is self interest.

[7] Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Commonwealth)

3.17 This inattention by subordinate contractors makes it very likely that a superior contractor could name an adjudicator who had known views that would assist the superior contractor in resisting or pressing a claim under contract.

3.18 Naming the arbitrator has been a standard element of the workplace / employment arbitral system used in many States of the USA. It has been roundly condemned[8] and the very real risk of the arbiter aligning themselves with the repeat party (i.e. the large contractor) rather than the infrequent user. The New York Times published on this in 2015[9] stating in part:

> *Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators. In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.*
>
> *Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company's lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.) Other potential conflicts are more explicit. Arbitration records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014.*

3.19 The original 1999 iteration of the NSW Act stated:

> *An adjudication application must be made:*
>
> *I. to an adjudicator chosen by agreement between the claimant and the respondent (being a person who is eligible to be an adjudicator as referred to in s18), or*
>
> *II. if no adjudicator is agreed on, to an authorised nominating authority chosen by agreement between the claimant and the respondent, or*
>
> *III. if no nominating authority is agreed on, to an authorised nominating authority chosen by the claimant, and*
>
> *IV. must be made within 5 business days after the claimant receives the payment schedule.*

3.20 As the Act allowed it, many construction contracts specified either the adjudicator or the ANA to which adjudication applications were to be made. There was an outpouring of complaints from claimants and industry bodies that caused the NSW Government to amend the provision to the current section 17(3), which provides that an adjudication application must be made to an ANA chosen by the claimant.

3.21 The original Victorian Security of Payment mirrored the original NSW provision and therefore construction contracts appointed adjudicators and ANAs. Similar complaints to those in NSW followed and the Victorian government also amended their Act.

[8] See the system described broadly in http://www.epi.org/publication/the-arbitration-epidemic/

[9] See https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0

Is the NSW model working (meeting our our principles for harmonised security of payment legislation)?

3.22 This is a glass half full answer. The NSW Act improved significantly with the first round of amendments in 2002. They provided teeth to the legislation, at the enforcement end and also removed some of the ineffective provisions which allowed a response to extend beyond the reasons of the payment schedule.

3.23 The 2010 amendment inserting a new Division 2A into the Act was also successful. That amendment allows a claimant (a subcontractor), who has made an adjudication application, to serve a 'payment withholding request' upon the principal. The principal is then required to retain sufficient money due to the respondent (a head contractor) to cover the claimant's payment claim. This new mechanism, while allowing a subcontractor to issue a payment withholding request much earlier than under the Contractors' Debts Act, does not guarantee payment to the subcontractor in circumstances where the principal has already paid the respondent its payment entitlement.

3.24 Subsequent amendments have been less successful.

3.25 The stated objective of the scheme is to facilitate payment of subordinate contracting parties, by allowing them to access a statutory adjudication process to obtain an interim determination of the rights of the parties. Largely the operation of the Act has been supported by the courts, which have also imposed some reasonably clear legal requirements around the scheme. While often described as statutory certification of the debt or the adjudicator as a certifier (in the contract sense) the role extends well beyond the scope of that role.

3.26 Certifiers do not consider legal submissions and are not expected to understand nuanced arguments dealing with estoppel and the like. If the role was ever one of a 'certifier' that has ended and the task of adjudication has become quasi-judicial[10] or that of a specialist tribunal.

3.27 Whatever the status of the adjudicator, it is broadly agreed the more recent round of changes in NSW have not enhanced the operation of the Act. This was compounded by early uncertainty (now resolved) as to which government department and particularly which government representative was responsible for the legislation and the point of contact for Adjudicators, ANAs, and the public.

3.28 The hallmark of the recent changes to the legislation in NSW and elsewhere is amendments that are incomplete, poorly drafted and generally the consultation has been insufficient or ignored. Having made those broad statements, it is relevant to undertake a quick analysis of changes that have occurred and a change that has not.

No Change

3.29 In every relevant submission to the NSW government, Adjudicate Today has promoted adoption of the more generous time provisions in Qld available to adjudicators when making their decision. In that state, the adjudicator's time runs from the actual receipt of the adjudication response (or when it should have been provided) rather than the adjudicator's date of acceptance of the application. The courts frequently comment on the 'pressure cooker'[11] environment imposed on adjudicators because of the short time frames. However, no change has been made to the legislative scheme in the various amendments nor has there been a public consideration of the merits of the proposal.

[10] See Grocon Constructors v Planit Cocciardi Joint Venture (No. 2) [2009] VSC 426 at [41], however that adds no particular 'superadded duty' Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 at [10]-[15]
[11] Her Honour Bergin J (as she was in Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd [2006] NSWSC 94 at [25] and Downer Construction (Australia) Pty Ltd v Energy Australia & Ors [2007] NSWCA 49 at [81]

Pointless Change

3.30 In April 2014, a hastily assembled package of amendments was introduced. They brought no effective change to the beneficial operation of the Act.

3.31 One of the changes was to remove the requirement for an endorsement on a payment claim. The endorsement had several clear benefits, including:

3.31.1 It evidenced the intention of the claimant was to engage the Act;

3.31.2 It created a path for escalation of a claim by adding the endorsement;

3.31.3 It was commended by the Court[12];

3.31.4 It had not been interpreted strictly or technically[13]; and

3.31.5 Its removal served no obvious actual purpose and has been criticised by the courts[14].

3.32 The removal was said to have been prompted by concerns regarding the endorsement attracting threats from respondents[15]. That motivation or logic is flawed in both execution and understanding.

3.33 Given the use of the endorsement was common place, the ire existed in 2003 not 2013. Secondly, for an adjudication to proceed absent a payment schedule a notice of election must be issued pursuant to section 17(2) of the Act. That provision requires by section 17(2)(a) that the notice advise it is issued pursuant to the Act. Given that a payment claim under the amended Act can be a vaguely worded document with minimal requirements, a respondent can readily overlook the legal importance. This means that from the first time the respondent is aware the Act is engaged it has only 5 business days to provide a payment schedule.

Vicious albeit unintended consequence of a change

3.34 Another change was to amend section 11 of the Act so that a construction contract has no effect to the extent it allows payment of a progress claim later than 15 business days after the payment claim is made by a head contractor to a principal and 30 business days after the payment claim is made by a subcontractor. Adjudicate Today supported this object. However, the unintended consequence was that parliamentary draftsman omitted section 11(1) in its entirety and inserted provisions as described above.

3.35 Section 11(1) contained a default provision that, in the absence of an express contract provision, the progress claim became payable after 10 business days. The vast majority of subcontractor contracts are written simply or are oral. Therefore, the default provision for subcontractor payment was moved from 2 weeks (10 business days) to 6 weeks (30 business days) and for head contractor payments from 2 weeks (10 business days) to 3 weeks (15 business days).

[12] Kingston Building Pty Limited v Warners Bay Developments Pty Limited [2009] NSWDC 203

[13] Hawkins Construction v Macs Pipework [2002] NSWCA 136

[14] His Honour McDougall J in Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602 at [3]

[15] In the second reading speech the honourable Minister Constance states:

> The bill also removes the existing requirement under section 13 (2) (c) that a payment claim include a statement that it is a claim being made under the Act. The inquiry found that this requirement was one of the factors that had led to an under-utilisation of the Act by subcontractors and should be abolished. Many subcontractors are reluctant to include such a statement in their payment claims to head contractors as it may be viewed as a signal of a possible dispute. The statement was made a requirement under the principal Act to ensure that respondents to claims were made aware of their obligations should a dispute arise. However, the Act is now in its fourteenth year of operation and is generally well understood by industry. An education campaign will communicate the reforms to industry.

3.36 The knock-on effects are vicious to subcontractors.

3.37 There are three streams for the adjudication process.

3.37.1 The claimant receives a payment schedule and disagrees with the scheduled amount in which case an adjudication application can be made immediately.

3.37.2 The claimant receives a payment schedule and is not paid all or some of the amount scheduled by the due date for payment. In this case, an adjudication application and suspension of work (on giving 2 business days' notice) can occur after the due date for payment passes.

3.37.3 The claimant does not receive a payment schedule in which case a section 17(2) notice should be issued warning the respondent that it has a further 5 business days in which to provide the payment schedule. After giving 2 business days' notice a suspension of work may also occur. However, the issuing of the section 17(2) notice and the suspension of work can only occur after the due date of payment passes.

3.38 The amendment to the Act, by omitting all of section 11(1,) has the following consequences in relation to claimants whose circumstances are as described in the 2nd and 3rd adjudication streams.

3.39 In relation to the majority of subcontractor contracts:

3.39.1 Oblige subcontractors to continue working for an additional 4 weeks without any payment before they can give notice to suspend work.

3.39.2 Extend the time before adjudication can commence by 4 weeks.

3.40 In relation to some head contractor contracts:

3.40.1 Oblige contractors to continue working for an additional 1 week without any payment before they can give notice to suspend work.

3.40.2 Extend the time before adjudication can commence by 1 week.

3.41 These consequences are quite inconsistent with the fundamental principle and contribute to a greater number of insolvencies in the building industry.

3.42 All this could have been avoided if, rather than omitting section 11(1), draftsman had amended section 11(1) as stated by government and retained the existing default position of 10 business days. In the alternative if government had followed Mr Collins advice for days and not business days, the consequences would be less severe.

3.43 Additionally, there has been a spike in the number of invalid applications going to adjudicators as parties argue over jurisdiction issues, particularly issues relating to time in which to make applications.

<u>Conclusion – Is NSW Working</u>

3.44 On balance the Act remains a powerful tool for subordinate contractors to secure cash flow and protect themselves in the event they have payment concerns. In addition to our previous comments, there remain four principal issues which should be addressed in national legislation:

3.44.1 The limited understanding of the mechanics of the Act in both industry and government;

3.44.2 The variable standard of preparers, many of whom hold themselves out as being professional, but have no depth of knowledge and no ethical constraints;

3.44.3 A need for proactive regulatory oversight of ANAs to ensure best practice by ANAs in their appointment of adjudicators to remove any real or imagined perception of favouritism in the adjudicator appointment process;

3.44.4 An absence of standardised training for adjudicators.

3.45 We conclude the current status of the Act in NSW is not optimal, but it is functional.

Are the South Australia, Tasmania, Australian Capital Territory, and Queensland (prior to the 2014 amendments) models working (meeting our our principles for harmonised security of payment legislation)?

3.46 The Acts of each State and Territory, identified above, were based on the 2002 amendments to the NSW model albeit with some significant time differences in the adjudication process. They have not followed the NSW amendments of 2014. They are also subject to the above four principal issues.

3.47 We conclude the current status of these States and Territory Acts are working well but have the capacity for improvements. The Qld Act (prior to the 2014 amendments) with the more generous time provisions available to adjudicators in making their decision and sensible due date for payment import provisions is the best of the legislative models.

Is the Queensland (post December 2014 amendments) model working (meeting our our principles for harmonised security of payment legislation)?

3.48 No.

3.49 The Qld Newman government's amendments to the Building and Construction Industry Payments Act 2004 ("BCIP Act") were focussed on strengthening the position of respondents, particularly government, property developers and larger contractors over the interests of subcontractors and those providing related goods and services to the industry.

3.50 The major amendments were:

3.50.1 Lodgement of adjudication applications with the adjudication registry at the QBCC;

3.50.2 Abolition of ANAs and the support services provided to all industry participants and adjudicators;

3.50.3 Referral of adjudication applications conducted by the adjudication registry;

3.50.4 Division of payment claims into standard and complex categories (complex claims being payment claims for an amount more than $750,000 exclusive of GST, standard being $750,000 or less exclusive of GST);

3.50.5 Time for lodgement of a payment claim (other than a final claim) reduced from 12 months from when work was last carried out or goods and services were last supplied to six months;

3.50.6 Additional timeframes for respondents to provide a payment schedule (complex claims only);

3.50.7 Requirement to serve a notice of intention to start proceedings if no payment schedule is received before being able to request judgement debt from the court and associated legal implication of this;

3.50.8 Additional timeframes for respondents to provide an adjudication response;

3.50.9 The ability for respondents to provide new reasons for withholding payment in their adjudication response (complex claims only);

3.50.10 The ability for claimants to provide a reply in response to any new reasons raised in an adjudication response (complex claims only);

3.50.11 Exclusion of 22 December to 10 January from the definition of business days to reflect industry shutdown;

3.50.12 Applications lodged after 5pm taken to be lodged the next business day; and

3.50.13 A positive obligation on adjudicators to determine whether they have jurisdiction to make a decision.

3.51 Many of these amendments are subject of Review questions and will be dealt with under those respective headings.

3.52 As will be obvious from our responses to several Review questions, we consider the amended Qld Act fails the fundamental principle and has resulted in loss of confidence in the BCIP Act and processes while greatly contributing to the rate of building and construction industry insolvencies in Qld.

Is the Victorian model working (meeting our our principles for harmonised security of payment legislation)?

3.53 Sections of the Victorian Act are confusing and most difficult to follow. Without legal advice from an expert practitioner, applications other than the simplest are likely to suffer deficiencies in their preparation. Areas which create problems for industry parties and limit the effectiveness of the Act include:

3.53.1 The exclusion of amounts from progress claims such as non-claimable variations, latent conditions, time-related costs and damages;

3.53.2 A claim under the contract for defective work may be regarded as a claim for damages; and

3.53.3 New reasons for withholding payment may be provided in the adjudication response.

3.54 We know of no industry representative organisation or party who will defend the Victorian Act in its current form. The Act fails the fundamental principle.

Is the West Coast model, representing West Australia and Northern Territory, working (meeting our principles for harmonised security of payment legislation)?

3.55 These schemes are roughly aligned with the UK model which is found in the Housing Grants, Construction and Regeneration Act 1996 (UK). That Act was designed as an interim mechanism that allowed construction disputes to be moved from the courts.

3.56 The process is more akin to statutory arbitration where either party to a dispute can be a claimant.

3.57 Adjudicators are nominated by prescribed appointers or may be agreed in contract. Earlier we have described the unfortunate experiences of claimants in Vic and NSW prior to both governments urgently removing the capacity for contractual appointment of an adjudicator.

3.58 By comparison to the Australian model, few applications have been made and they have tended to be for high value claims. Consider for example financial year 2013 / 14. In WA, the Act delivered 235 adjudications with a mean value of $2,470,875.00. Qld (before the 2014 amendments) had 670 applications with an average value of $463,909.82. The disparity in appointment was also present with 38 of the 76 registered adjudicators in WA not receiving an adjudication referral during the period. We are not aware of this statistic being available in NSW.

3.59 Time frames (other than for complex claims made in Qld) are also far longer.

3.60 Cost is greater. To the best of our knowledge there are no low-cost schemes for low-value claims in place in either WA or the NT.

3.61 A different series of challenges have been applied in the UK model with complexity being argued. That is a party can challenge the determination if the matter is considered to be too complex to be decided in adjudication. Further timelines are longer with 28 days for applications after the occurrence of a payment dispute. Additionally, the model does not allow a claim to be recycled that is more than 28 days old (save in a final claim). Finally, the UK model requires leave of the court to enforce and that leave can be challenged[16].

3.62 Setting aside the mechanics, the Acts in play in Australia are very different. To the best of our knowledge, only one or two matters considered under the Australian model have had adjudicators appoint experts. The UK model allows that and the fees are recoverable. It does not appear that the parties can object to this course of action which would be both expensive and time consuming.

3.63 The Australian model is both more efficient and cost effective in ensuring parties are paid quickly for work they have performed. The West Coast model fails the fundamental principle, particularly in relation to smaller claims.

[16] A reasonable summary of the mechanics of the UK model is found at http://www.constructionlawmadeeasy.com/SecurityofPaymentWA (courtesy of Minter Ellison)

4. **QUESTION 2 - Should the legislation provide for two separate types of claims (i.e. 'standard' and 'complex' 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)?

4.1 These two questions consider the recent Qld amendments which created two tiers for adjudication split by value. The current point of separation is payment claims with a value of $750,000.00 excluding GST, principally to align with the Supreme Court monetary limit.

4.2 The Qld Act originally intended to define 'complex claims' by reference to content, however that became too difficult if one was to define any claim which included latent conditions, liquidated damages, delay claims or the like as complex. Largely because these can also occur in smaller claims (e.g. $10,000), additional time would not aid the parties and the right to provide new reasons is inimical to the timely operation of the Act.

4.3 We are aware that the NSW government established a Working Party to examine creation of a division between simple and complex claims. We understand the group was unable to find any workable division, other than a monetary amount, and was disbanded without making a recommendation.

4.4 Any monetary cut off amount is contrived. Some large claims are simple and some $500,000 claims are very complex. Money alone is not a good point of demarcation. It can be that a claim is complex, where the sum in dispute is $50,000 if the payment schedule largely agrees with the amount claimed. Further, the consideration of time or condition based claims as originally considered also raises issues, not the least being the parties arguing they are in the incorrect forum because the variation does not relate to a latent condition (for example).

4.5 In Qld, parties have largely abandoned making complex claims. Statistics, published by the Qld Adjudication Registrar, tell the story. These statistics are published at https://www.qbcc.qld.gov.au/adjudication-monthly-statistical-reports and https://www.qbcc.qld.gov.au/adjudication-reports-archive.

4.6 Prior to 30 June 2015, the registrar did not publish information relating to complex claims. The best comparison we can make from the published data relates to the five 6-monthly periods contained within the 30-month period, 1 July 2014 – 31 December 2016. However, it should be noted that data for the period prior to 30 June 2015 relates to applications in excess of $500,000 and the data after 1 July 2015 relates to complex claims (in excess of $750,000).

I.	1 July 2014 – 30 December 2014	35 applications
II.	1 January 2015 – 30 June 2015	20 applications
III.	1 July 2015 – 30 December 2015	13 applications
IV.	1 January 2016 – 30 June 2016	9 applications
V.	1 July 2016 – 31 December 2016	6 applications

4.7 These figures evidence that as claimants become familiar with the effect of the amendments to the adjudication process for complex claims, they find the process most unattractive. In the 6 months, immediately prior to the introduction of the amendments, there were 35 applications. In the last 6-month period, there were 6 applications. The number of applications made has reduced by more than 80%.

4.8 Time is of the essence in resolving industry payment disputes. If contractors are not being paid promptly, subcontractors will be forced to wait and incur financial pressure. However, the timeframe to resolve complex matters in Qld has exploded from 6 weeks before the 2014 amendments to up to 24 weeks.

4.9 Despite one matter taking an adjudicator 206 business days to decide (his fee was $575,000), the registrar sets this matter aside for statistical purposes. She publishes just 97 business days as the maximum period which can equate to 24 weeks and more.

4.10 A 24-week decision is reflected by this example. On 20th July 2016 an adjudicator, John Tuhtan (unknown to Adjudicate Today), delivered a decision (number 12064) in relation to a claim for $4,524,675. It was 5.5 months between service of the payment claim (5 February 2016) and the decision. The adjudication fee was $159,621. Adjudicate Today cost estimate for that dispute under the pre-2014 amendments is a process time of 1.5 months and cost of $40,000.

4.11 If those at the top of the contractual chain are not paid promptly, those further down have little to no hope.

4.12 No claimant, properly advised by experienced lawyers, should commence a potential 24-week process for an interim decision. WA's security of payment model is properly criticised for its extended time frames. However, decisions in that State are final whereas all Australian model decisions are interim.

4.13 The average adjudicator fee as a percentage of the value of the claim for adjudicating larger matters and complex matters has increased exponentially. Every month in the statistical report, the Registry publishes a table of average fees as a percentage of claim. These figures are exclusive of GST and the application fee.

4.14 **Table 1 - ADJUDICATION FEE STATISTICS**

Value of Claim	**Pre-Amendments**	**Post-Amendments**	**Post-Amendments**
	1 July 2014 - 30 December 2014	1 July 2015 - 30 June 2016	1 July 2016 – 31 December 2016
$0 - $4,999	23.4%	25.4%	41.5%
$5,000 - $9,999	15.0%	10.9%	12.0%
$10,000 - $24,999	9.8%	7.5%	8.7%
$25,000 - $39,999	8.8%	10.1%	9.8%
$40,000 - $99,999	6.2%	7.5%	8.5%
$100,000 - $249,999	4.8%	4.2%	4.8%
$250,000 - $499,999	2.5%	2.5%	4.3%
$500,000 - $749,999	0.2%	2.4%	2.8%
$750,000 +	0.2%	1.8%	2.1%

4.15 Despite the Registrar's undertakings to the Qld parliamentary committee enquiring into the Bill that adjudication fees would not increase, fees have increased hugely in two areas. Firstly, for small claims under $4,999, fees have almost doubled from 23.4% to 41.5%. Secondly, for larger claims. The cost of adjudicating a claim in the $250,000 to $499,999 group has almost doubled from 2.5% to 4.3%. However, it is for claims above $500,000 where truly massive increases have occurred. The cost of adjudicating claims in the $500,000 - $749,999 have increased by 1,400% from 0.02% to 2.8% and in the over $750,000, it is more than 10 times (1,050%).

4.16 These figures do NOT take account of either GST or the new adjudication application fee. The Qld government's average application fee for a complex matter is $2,648. By way of comparison Adjudicate Today, and most other ANAs, charge $0 in all States and territories in which we nominate.

4.17 The Registry does not return the adjudication application fees for an invalid application. This represents another take from industry participants. The Conditions of Authorisation (CoA) of Authorised Nominating Authorities (ANAs) in Qld and issued in 2013 provided at clause 2F:

> *"If a registered adjudicator fails to accept the adjudication application within 4 business days after the adjudication application is made, or fails to determine the application within the time allowed under the Act, and as a consequence the claimant withdraws the application under section 32 of the Act, the ANA must refund to the applicant any fee paid by the applicant with the adjudication application which has been withdrawn".*

4.18 The Registry has abandoned this policy and keeps all adjudication application fees.

4.19 Expressed in dollars, the average adjudicator fee for complex claims was $92,286 which is 12.3% of $750,000. If the single largest fee of $575,000 charged by an adjudicator is eliminated entirely from the statistics, the percentage drops to 7.7% of $750,000 which remains unacceptably high.

4.20 No other jurisdiction has this division between simple and complex claims. If it is felt respondents should have more time to prepare an adjudication response, we recommend increasing the existing 5 business days to 10 business days for all applications (or from 2 to 5 business days after receipt of adjudicator's notice of acceptance, whichever is the later). We give further attention to this and other time issues in response to subsequent questions.

4.21 In the absence of an artificial division, we recommend permitting adjudicators a discretion for a further 5 business days in which to make a decision. This has several benefits:

4.21.1 If combined with the adoption of the Qld start date for the adjudicator's time, it can add as much as 10 business days in which the adjudicator can make the decision.

4.21.2 It allows a graceful way of rectifying a date miscalculation where the adjudicator is contemplating seeking additional time on day 11 or 12.

4.21.3 It does not preclude seeking additional time if required and agreed by the parties[17].

4.22 There is no obvious benefit to splitting the applications on the basis of complexity or value. The complex maters in Qld have extended across many months and delivered little to no benefit to cash flow (a key reason for the creation of the scheme). Further it has proved fertile ground for parties to make multiple submissions that they require more time and the documents cannot be prepared in the times required. Ultimately, a party will take this to court as part of the challenge to validity of the decision based on a denial of procedural fairness.

[17] Clearly better practice would be to seek the agreed extension and hold the five days in reserve if required.

4.23 For complex payment claims, the Qld amendments also allow for the respondent to provide additional reasons for withholding payment. This can extend the time taken for adjudication by significantly more than 20 business days because the claimant must be allowed time in which to consider and respond to the new reasons. Basic tenants of the Australian model of notifying the subcontractor or other provider with all the reasons for withholding payment and paying what is due without delay were broken.

4.24 In summary, we oppose the creation of an artificial division between simple and complex claims.

4.25 By any measure, the Qld complex claim regime is an abject failure which overwhelmingly fails the fundamental principle.

5. QUESTION 4: What should be the appropriate period in which a payment claim may be served under the Act?

5.1 Is allowing a claimant to make a claim up to twelve months after the construction work has been completed consistent with the prime objective of facilitating progress payments and thereby improving cash flow – the fundamental principle?

5.2 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?

5.3 Conversely, is the 3-month timeframe set out under the Victorian Act too restrictive? Is the 6-month timeframe set out under the SA Act more reasonable?

5.4 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)?

5.5 Where a fixed period has been adopted, the period commences when relevant construction work has been carried out and ranges from the tight 3 months in Victoria to 12 months permitted in NSW, Tas and the ACT. In Qld (post 2014 amendments) and SA, the relevant period is 6 -months.

5.6 WA and the NT allow a payment claim to be served at any time after the contractor has performed any of its obligations. Of course, in those jurisdictions a wider range of claims is allowed than in the Australian model which is confined, in essence, to claims by claimants for the payment of moneys pursuant to contractual entitlements.

5.7 Provided that one accepts the argument for uniformity, it is submitted that few things could better demonstrate a genuine national scheme that was widely understood and supported than one which prescribed a single and common period within which it was permissible to serve a payment claim.

5.8 We do not recommend the open-ended approach taken by WA and the NT and it is submitted that the relevant question is whether the appropriate period should be 3, 6 or 12 months.

Three months

5.9 The Victorian choice of 3 months certainly acknowledges the Act's underlying rationale of prompt payment. However, Victoria is more likely than any other State or Territory to produce the result that the Act becomes regarded as a port of first call, militating against the resolution of disputes by the parties themselves. That in turn could adversely affect what might already be a strained relationship.

5.10 Of the three periods under consideration, the Victorian model of 3 months is the one most likely to see claims inadvertently time barred.

Twelve months

5.11 At our annual seminar, a majority of adjudicators favoured a 12-month period on the basis that it retained consistency between the Act and the terms of most construction contracts which generally provide a defects liability period of 12 months.

5.12 12 months also allows ample time for parties to attempt to negotiate settlement before proceeding to adjudication.

Six months

5.13 Other adjudicators argue that 6 months, is a fairer period.

5.14 Permitting a claimant to serve a payment claim up to 12 months after the date upon which the claimant first became entitled to serve the claim does not sit well with the Australian model's overriding objectives of maintaining cash flow within the industry. If a party has waited 12 months to serve the payment claim, can it be argued there is a real cash flow problem which needs to be addressed under the Act?

5.15 Is it fair to give the claimant 12 months within which to serve its payment claim when the respondent is given only 10 business days to respond to the payment claim? A few respondents argue that a shorter period will reduce the possibility of an "ambush" claim being prepared. We deal with this issue at Question 8.

5.16 The proponents of six months argue that theirs is the best balance between the competing arguments. This period would enable parties to explore directly opportunities for resolution without being driven to have recourse to the statutory regime. It would require claimants to bring forward claims by comparison to the periods presently operating in NSW, Tas and the ACT if those claims were not to be time barred, but not in a manner which visits undue hardship upon claimants.

Retention monies

5.17 Regardless of the appropriate period adopted by the Review as best consistent with the fundamental principle, special provision should be made for the recovery by adjudication of retention monies.

5.18 Retention monies may not be payable under a contract until after the expiration of any "appropriate period" established by uniform Acts. In order to secure a claimant's statutory right to recover retention monies, it is desirable to draw the Victorian Act's distinction between a payment claim for performed work and a payment claim that is a final payment claim, so that the appropriate period for purposes of the final payment claim would run from either:

5.18.1 The date when construction work was last carried out or related goods and services were supplied, or

5.18.2 The date fixed by the contract.

6. QUESTION 5 – What should be the due dates for payment of a progress claim?

QUESTION 6 – Should there be a difference 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?

6.1 On 9 August 2012, the NSW Government established an inquiry into Construction Industry Insolvency in NSW, headed by Bruce Collins, QC. The impetus was the financial collapse of several established building/construction companies. The purpose of the inquiry was to recommend measures to better protect subcontractors from the effects of insolvency of head contractors.

6.2 The Final Report was published on 28 January 2013 (Collins, 2003). It made a number of recommendations, some of which were adopted by the NSW Government as the 2013 Amendments of the Act. The relevant amendments are now briefly discussed.

6.3 Superseded section 4 of the Act provided definitions of various terms including the definition of claimant and respondent. Amended section 4 introduces, for the first time, definitions of subcontractor, head contractor and principal. This was necessary for the proper interpretation of a new regime for the due date for payment outlined in amended sections 11(1A–1C), trust accounts for retention in section 12A and the supporting statement in section 13(9) of the Act.

6.4 A head contractor is defined as "the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the main contract) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract".

6.5 It emerges from this definition that a party cannot be a head contractor unless the party enters a construction contract that requires another party to carry out part of the head contractor's obligations under the main contract. A head contractor must also have at least two construction contracts, one with the principal and one with a subcontractor. A head contractor, whose construction contract bars sub-letting of any part of the contract works, is not a head contractor but a subcontractor.

6.6 While there will always be a subcontractor, given the varied nature of contractual arrangements associated with building/construction projects and the varied nature of roles played by participants to construction contracts, Davenport[18] (2014, pp. 2–4) observed that:

> *"in the course of a contract, a principal can mutate and cease to be a principal and a subcontractor can mutate and become a head contractor. On any day, you may not know whether a party to a construction contract is a principal, a head contractor, a subcontractor or something else".*

6.7 In circumstances, where a subcontractor or a head contractor can both be a claimant, the parties' failure to correctly identify their status could lead to confusion as to whether the claimant is a subcontractor or a head contractor and whether the respondent is a principal, a head contractor or a subcontractor. These new definitions bring real problems for adjudicators in interpreting the proper status of the parties.

[18] Davenport P (2014) *Adjudication - recent changes to the NSW Act. A supplement to Adjudication in the Building Industry*, 3rd edition, 2010, Federation Press, Australia.

6.8 Prior to the 2013 Amendments, the due date for payment was, according to section 11 of the Act, 10 business days after a payment claim was made if a construction contract made no express provision thereof.

6.9 The amended section 11 now differentiates between payment by a principal to a head contractor and payment to a subcontractor. Under section 11(1A), the maximum period for payment to a head contractor is 15 business days after a payment claim is made and under section 11(1B), the maximum period for payment to a subcontractor is 30 business days after a payment claim is made.

6.10 The rationale for mandating the maximum period of 15 business days for payment to a head contractor is to improve the flow of cash from top of the contractual chain down through the supply chain. This amendment clearly benefits head contractors' cash flow but it may impair the principals' ability to source funds from lenders within the prescribed time frame.

6.11 The statutory maximum period of 30 business days for payment to subcontractors is likely to adversely affect the cash flow of subcontractors involved in small value subcontracts, who often enter into subcontracts with no express terms of payment. Prior to the 2013 Amendments, payment was, in those circumstances, due within 10 business days of the date of service of a payment claim. Under the amended section 11(1B), payment is now due some 20 business days later.

6.12 The only subcontractors who may benefit from the amendment are those, involved in high value subcontracts, where they traditionally receive payment well after the new mandatory period of 30 business days.

6.13 Developers or end users (principals) have the funding in place and are enjoying the benefit of the head contractors' and subcontractors' efforts. There is no reason for them to pay in a longer period.

6.14 This amendment means that claimants have to wait an extra 20 business days before they can lodge notices regarding:

6.14.1 Having a payment claim adjudicated when there is no payment schedule; or

6.14.2 Suspending work.

6.15 Respondents are actually better off not providing payment schedules because the time for an adjudication determination and subsequent payment extends the payment of the adjudicated amount by 20 business days.

6.16 We submit the previous default provision under the NSW Act should be reintroduced i.e. if the contract makes no express provision for the due date for payment, it should be 10 business days after the payment claim is served.

6.17 Where the parties choose to extend the due date for payment under a written contract, we submit the maximum period should be 20 business days after the payment claim is served.

6.18 We consider our approach is best practice and consistent with the fundamental principle which provides for the right of anyone who performs work in accordance with a contract to be paid *without delay* (emphasis added) for the work they have done.

7. 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?

7.1 Generally, and these comments apply equally to questions 8, 9 and 10, the courts have taken a strict attitude to time limits under the respective Acts.

7.2 In *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors* [2013] VSC 552, his Honour Justice Vickery in the Supreme Court of Victoria emphasised that, while the Act is intended to provide for the rapid determination of progress claims under construction contracts, without the parties becoming weighed down in lengthy and expensive litigation, nevertheless mandatory time limits in the Act need to be strictly observed in order to properly balance the relevant competing interests. In this regard Vickery J stated:

> *[T]he Act gives very valuable, and commercially important, advantages to builders and subcontractors. It alters the balance of power in favour of those parties in relation to progress payments in a significant way. In recognition of this position, the availability of the rights conferred by the Act are governed by, and depend upon, the observance of clear specifications of time and the other requirements expressed in the Act, either in mandatory terms or as defined prohibitions. These provisions are to be found at each stage of the regime for enforcement of the statutory right to progress payments. Such provisions, in accordance with the legislative purpose expressed in the text of each, call for strict observance.*[19]

7.3 The case is a reminder that the Courts perceive a necessity to strictly apply any time limits to balance any perception of public policy that the provisions of the Act favour the claimant. The strict observance of the timing provisions of the Act is highlighted by the significant increase in adjudication court cases concerning the availability of a reference date. Recent examples include the Victoria Court of Appeal case of *Gregory Paul Saville (trading as China Sourcing Services) v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 and the High Court decision in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd & Ors* [2016] HCA 52.

7.4 In relation to the appropriate timeframes for a respondent to provide a proper response to a claimant's payment claim and provide a payment schedule, the overwhelming view of our adjudicators is to retain the Australian model default for 10 business days of being served with the payment claim. Payment schedules are not required to give full particulars of the reasons for withholding payment as long as the essence of "the reasons" is made known to the claimant. Reasons for withholding payment should be sufficiently clear to allow a claimant to make a decision whether or not to pursue their claim and to understand the nature of the case against it at adjudication.[20]

7.5 Some want of precision and particularity is generally permissible in the drafting of a payment schedule.[21] As a result, the preparation of a payment schedule is generally less time consuming than the preparation of an adjudication response which requires detailed particulars.

7.6 However, we understand that a small number of respondents argue for a longer period given claimants have, in some jurisdictions, 12 months in which to serve the payment claim (refer response to Question 4).

[19] Gregory Paul Saville (trading as China Sourcing Services) v Hallmarc Constructions Pty Ltd [2015] VSCA 318 at [47].
[20] Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140 at [70] to [79].
[21] Ibid at [78].

7.7 If the Review recommends retention of the 12-month period in which the claimant may serve a payment claim, the following is a possible compromise which takes into account respondent concerns:

7.7.1 Where the payment claim is served within three months after completion of work – 10 business days to provide the payment schedule.

7.7.2 Where the payment claim is served within three to six months after completion of work – 15 business days to provide the payment schedule.

7.7.3 Where the payment claim is served within six to twelve months after completion of work – 20 business days to provide the payment schedule.

8. QUESTION 8 - What should be the appropriate timeframe to be given to a claimant for the lodgement of its adjudication application?

8.1 The consistent Australian model time of 10 business days is appropriate. We know of no agitation for this period to be varied.[22]

8.2 Once the Act is engaged, a claimant should bring the matter on promptly. The respondent is entitled to know whether or not it will be involved in an adjudication as a consequence of receiving the payment claim.

[22] South Australia provides for 15 business days.

9. QUESTION 9 - What should be the appropriate timeframe to be given to the respondent to prepare its response to the claimant's adjudication application?

9.1 The Australian model provides a period from 5 to 10 business days for the lodgment of the adjudication response from receipt of the adjudication application or a period from 2 to 5 business days from service of a notice of the adjudicator's acceptance, whichever the later.

9.2 In our response to Questions 2 and 3, we expressed our opposition in drawing the distinction between simple and complex claims. We submitted that all applications should be treated in the same manner as any distinction would be arbitrary.

9.3 However, at para. 4.20 we said, *"If it is felt respondents should have more time to prepare an adjudication response, increase the existing 5 business days to 10 business days for all applications (or from 2 to 5 business days after receipt of adjudicator's notice of acceptance, whichever the later)".*

9.4 While reluctant to give full support to such a provision, we acknowledge that it will be of major benefit to respondents should the Review not support the arbitrary separation of applications between simple and complex.

10. QUESTION 10 - What should be the default period within which an adjudicator is required to make a determination or decision?

10.1 As previously expressed, we support the SA, Qld (simple claims only), Tas, NT and ACT period of 10 business days after receiving the respondent's adjudication response.

10.2 The NSW and Victorian timeframe of counting from the date of acceptance of the application places undue time pressure on the adjudicator particularly as there can be argument over the service of an adjudication application on the respondent or the validity of the response which effectively reduces the time for the adjudicator to complete the determination.

10.3 In our response to Questions 2 and 3, at para 4.18 we said*, In the absence of an artificial division, we recommend permitting adjudicators a discretion for a further 5 business days in which to make a decision. This has several benefits:*

10.3.1 If combined with the adoption of the Qld start date for the adjudicator's time, it can add as much as 10 business days in which the adjudicator can make the decision.

10.3.2 It allows a graceful way of rectifying a date miscalculation where the adjudicator is contemplating seeking additional time on day 11 or 12.

10.3.3 It does not preclude seeking additional time if required and agreed by the parties.

10.4 Because a small number of parties have been known to undermine the adjudication process by hedging their response to a request for additional time, we recommend that the adjudicator's discretion to allow a further 5 business days can be made within 5 business days of the expiry of the original time.

10.5 We note the Victorian Act allows an adjudicator to seek extra time from the claimant only which cannot be unreasonably withheld. We see no utility in this if the adjudicator has an absolute discretion to extend time to decide an adjudication application by a further 5 business days. Clearly an adjudicator should seek the agreed extension first and hold the 5 business days in reserve, if required.

10.6 There should be a minimum time within which an adjudicator can make a decision. This will eliminate the problem which arises on occasion when a claimant purports that a payment schedule was not provided by a respondent when, in fact, the respondent is able to demonstrate its provision of the payment schedule to the claimant. In these instances, adjudicators who make decisions prior to the expiry of the time for an adjudication response can deny respondents procedural fairness.

10.7 We recommend the minimum time frame be either 5 or 10 business days based on your consideration of para 9.3 above.

11. QUESTION 11 – What should be the process for appointment of adjudicators?

11.1. An adjudicator should be nominated by the Authorised Nominating Authority (ANA) chosen by the claimant.

11.2. ANAs should be authorised by government to nominate adjudicators and be subject to strict regulatory oversight by government against Conditions of Authorisation (CoA). If an ANA does not comply with the CoA, they may face removal of their authorisation to nominate.

11.3. A minimum number of five ANAs drawn from both the private and not-for-profit sectors should be authorised to provide a national service consistent with the CoA.

11.4. An ANA should demonstrate a financial and administrative capability to provide quality services nationally on a competitive basis, including:

11.4.1. The method of training, selection and monitoring of adjudicators nominated by the ANA;

11.4.2. System used for nomination of adjudicators;

11.4.3. Systems in place to provide unbiased, accurate and timely assistance to industry participants on the processes to comply with the Act;

11.4.4. Financial and corporate details of the ANA;

11.4.5. Procedures in place for receiving and dealing with complaints relating to the ANA or adjudicator performance.

11.5. Once authorised each ANA should carry out its functions as specified in the Act, manage the adjudication application and adjudication certification processes and generally report to the Minister on its activities and business arrangements.

11.6. The Act should provide the Minister with substantial powers to effectively and efficiently oversight ANA's. Regulatory and administrative arrangements for the accountability framework could be housed within the Office of the Australian Business and Construction Commissioner (ABCC).

11.7. A minimum number of five ANAs is proposed to ensure effective and real competition in the supply of services.

11.8. These proposals are consistent with the respective Acts in all Australian jurisdictions until 2014 when Qld broke from these common arrangements (the common arrangements) and legislated for the Adjudication Registrar established under the BCIP Act to be the sole nominating authority. Qld is the only State to have legislated for a statutory office of Adjudication Registrar.

11.9. The common arrangements provide that the vast majority of registry functions of the adjudication process are devolved to the ANAs. This is to avoid what would otherwise be a significant cost to government of staffing and maintaining the registry. Under the respective CoAs, ANAs are required to perform the registry functions but at no cost to government in what is essentially a user pays system. This approach also enables government to maintain a level of independence from the adjudication processes.

11.10. Most ANAs, not only provide the services specifically required or implied by the respective Acts and the CoAs but, also promote the principles and practices of security of payment by providing information for industry participants, forums for discussion, conferences, publications, encourage research, and make submissions to government for improved legislation based on their day to day experience with the industry, government and the practical application of the legislation.

11.11. In relation to the common arrangements and the Qld 2014 experiment, the Issues Paper quotes from three State reports. We comment in the same order as the Issues Paper:

11.11.1. In NSW, the Collins report recommended that the NSW Act be amended to remove the right of a claimant to choose *"its own adjudicator"*, which *"presumably was intended to refer to the claimant's right to choose an ANA"*. This comment by the Review aligns with the NSW government response to the Collins report but that response, confirmed by Mr. Collins, misunderstands the recommendation. Mr. Collins knew exactly what he was recommending and got it entirely correct. Mr. Collins had in mind bringing into the NSW Act a provision similar to section 18(2)(b) of the SA Act. This provides that a person is not eligible to be an adjudicator in relation to a particular construction contract if either or both of the parties have nominated that person to be an adjudicator in relation to the contract. There is no equivalent provision in the NSW Act or the BCIP Act. In discussions with Mr. Collins, we promoted section 18(2) of the South Australian Act as an effective method of preventing claimants or their agents attempting to improperly influence an ANAs nomination of an adjudicator. We understand Mr. Collins believes that adopting the SA provision is a good way of strengthening the statutory independence of ANAs in their nomination of adjudicators. We support this view. His recommendation should not be taken as a reflection on the services provided by ANAs.

11.11.2. In Qld, the Wallace Report recommended the in-sourcing of the role of an ANA to the Adjudication Registry as it *would "remove many, if not all the perceptions of conflict of interest and apprehended bias"*. This recommendation was the basis of many of the unfortunate 2014 amendments which are now widely criticised. We return to this issue at para 11.15 onwards.

11.11.3. In SA, the Moss report recommended that the Small Business Commissioner be the sole person discharging the functions of an ANA. In this regard, it should be noted that the recommendation has been subject to a major backlash from literally every industry association in that State. Much of the reaction is sourced from industry concern and repulsion at the impact of the 2014 Qld amendments. It has been reported that the South Australian government is not acting on the recommendation and will await the findings of this Review.

11.12. The 2014 Qld amendments have been in operation for 29 months. Since the BCIP Act commenced in 2004, the Adjudication Registrar has been required to publish monthly and annual statistics. As noted at para 4.5, these statistics may be downloaded from https://www.qbcc.qld.gov.au/adjudication-monthly-statistical-reports and https://www.qbcc.qld.gov.au/adjudication-reports-archive.

11.13. As at the date of this submission, the Registrar is three months behind in the publication of statistics, the most recent report being for January 2017. However, the statistics provide a comprehensive analysis over two complete years of the failures inherent in the Qld adjudicator appointment process when contrasted to the common arrangements.

11.14. We submit that the Review, in considering the process for appointment of adjudicators, needs to contrast the Qld amendments to the common arrangements by close study of three very relevant and important issues. We next consider these issues.

11.14.1. Whether there is bias in the adjudicator appointment process in any of the jurisdictions.

11.14.2. The quality of advice and services available to Qld industry participants making or responding to an adjudication application contrasted to other jurisdictions.

11.14.3. The effectiveness of the Qld Adjudication Registrar in managing adjudication applications contrasted with other jurisdictions.

Whether there is bias in the adjudicator appointment process in any of the jurisdictions.

11.15. As noted in the Issues Paper, the Wallace Report recommended the in-sourcing of the role of an ANA to the Adjudication Registry as it *would "remove many, if not all the perceptions of conflict of interest and apprehended bias"*.

11.16. In dealing with bias, Mr. Wallace quotes from unnamed sources. There is no way of determining whether the sources are representative of the industry or only that small fraction which represents the major property developers and tier one or two construction companies. However, a small number of industry associations were quoted. Importantly, none of them called for the abolition of ANAs or for the Adjudication Registrar to replace ANAs in the provision of their services.

11.17. The Electrical Contractors Association and Master Electricians Australia argued, *"While the potential for bias inherent in the current system for appointing adjudicators is minimal, the perception of bias may be problematic for the effective administration of the BCIP Act. An alternative may be to appoint an officer in charge of the authorised nominating authorities. This officer would be responsible for evenly allocating cases to adjudicators to ensure a fair and equitable resolution process for all parties. Statistics on adjudication outcomes would need to be compiled in order to ensure that no bias is demonstrated by any adjudicators."*[23]

11.18. The Australian Institute of Building submitted that a "consensus approach" was preferred over the current appointment process. They said: *"Rather than the current process of authorised nominating authorities chosen by the claimant appointing adjudicators, AIB would prefer a consensus approach where both parties agree on an adjudicator. This would reduce perceptions that authorised nominating authorities chosen by the claimant have a tendency to appoint adjudicators which have a history of making decisions in favour of the claimant".*[24]

11.19. The Queensland Major Contractors Association said, the "*Discussion Paper raised another option for reform being a government entity with the sole responsibility for the appointment of adjudicators under the Act. Nearly all Members were against this option. Members expressed a strong preference for the ANAs to remain in the private sector, as a government entity potentially would not be able to offer the same level of access, flexibility and resources as a group of private entities."*[25]

[23] Wallace Discussion Paper – Payment dispute resolution in the Queensland building and construction industry, May 2013 p.133
[24] Wallace Ibid at p. 136
[25] Wallace Ibid at p. 137

11.20. The Housing Industry Association supported "*a move towards a centralised system of appointment of adjudicators by way of a sole ANA, being a privatised agency. In terms of appointing the sole ANA, HIA is of the view that the ANA agency position is annually put to tender by the Building and Construction Industry Payments Agency, with the requirement to meet the application criteria as currently applied."*[26]

11.21. Importantly, no named industry association gave support to the abolition of ANAs or for the Adjudication Registrar or other government agency to be solely responsible for the appointment of adjudicators. Indeed, it can be implied that all were opposed to both.

11.22. No-one argued there was an actual bias in the appointment system and Mr. Wallace went to some length to state that his finding was one of apprehended bias rather than actual bias.[27]

11.23. However, unlike any court based or other responsible process, the Wallace Report does not examine the available evidence. A finding of apprehended bias requires a scrutiny of the evidence, rather than reliance on unfounded, unsourced, anonymous allegations from a potentially small number of self-interested respondents. Many of these respondents have long opposed both the BCIP Act and the fundamental principle as it limits their capacity to divert payments received for the work of their subcontractors to unrelated projects over extended periods of time. ANAs and adjudicators, subject of the criticism, were entitled to a right of reply. None of this happened.

11.24. Evidence was available to Mr. Wallace. That evidence is presented in the statistics collected by the Adjudication Registrar. The Adjudicate Today submission provided those statistics to Mr Wallace. This issue was also raised by Adjudicate Today with Mr. Wallace during consultation. We were assured by Mr. Wallace that he would examine the statistics. That same day we spoke to the Adjudication Registrar and were assured that the statistics had been supplied to Mr. Wallace.

11.25. We submitted to Mr. Wallace there was an obligation for him to study the statistics and to make a finding based on the empirical evidence rather than any unsupported allegations. We workshopped a proposal initially presented by the Adjudication Registrar that he appoint adjudicators from three or more adjudicators nominated to him by ANAs.

11.26. That Registrar's proposal would have allowed ANAs to continue providing services to industry participants and nominating adjudicators. The only change would have been that the Registrar made the appointment from three or more of the adjudicators nominated by the Authorised Nominating Authority. However, the Registrar's option is not published or considered in the Wallace report despite there being a lengthy section on options for adjudicator appointment.

11.27. The Adjudicate Today submission to Mr. Wallace at para 8.18 – 8.19 analysed the issue of bias by examining the Registrar's published statistics[28]. We said*:*

> *Empirical evidence is available as to the "claimant friendliness" of adjudication. For years statistics have been collected and published on a monthly basis by the adjudication registrar. The most recent report is dated 1 February 2013 and covers the period 1 July 2012 to 31 January 2013.*

Under the heading "Decided Matters Statistics" the following two tables appear:

[26] Wallace Ibid at 138

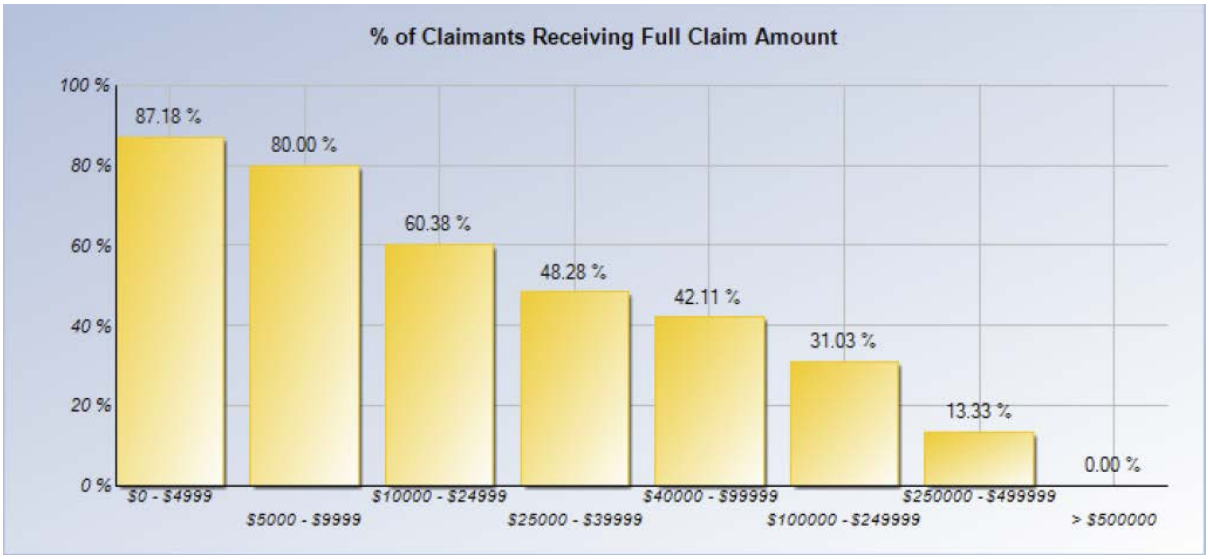
[27] Wallace Ibid at p. 155

[28] Adjudicate Today submission "Response to Payment Dispute Resolution in the Queensland building and construction industry" 13th February 2013

Table 1 - Queensland Decided Matters Statistics 1 July 2012 – 31 January 2013

Range of Claims YTD	Total	Average Claim Amount	Average Scheduled Amount	Average Decided Amount	% of Claimants Receiving Full Claim Amount
$0 - $4999	39	$2,914	$229	$2,690	87.18 %
$5000 - $9999	25	$7,531	$1,582	$6,931	80.00 %
$10000 - $24999	53	$15,393	$2,315	$13,213	60.38 %
$25000 - $39999	29	$31,401	$702	$24,764	48.28 %
$40000 - $99999	38	$64,265	$5,669	$51,636	42.11 %
$100000 - $249999	29	$157,240	$20,804	$99,159	31.03 %
$250000 - $499999	30	$341,180	$41,333	$228,336	13.33 %
> $500000	40	$9,956,279	$1,428,329	$4,550,794	0.00 %

Bar Chart



And at para 8.19:

> *As observed at point 8.7, the majority of smaller adjudication applications are made in the absence of payment schedules. Therefore the adjudication applications can't be defended by respondents and it can't be surprising that the majority of such applications are 100% successful. The number of applications received without payment schedules drops rapidly as the value of the claim increases. What is surprising is the huge drop in successful applications once the value of the claim exceeds $25,000. 9 claims out of 29 in the $100,000-$249,000 range, 4 claims out of 30 in the $250,000-$499,999 range and 0 claims out of 40 in the above $500,000 range. These are not figures representing a "claimant friendly" process. Indeed they are indicative of adjudicators taking their responsibilities most seriously and that their decisions are balanced by the arguments advanced by parties.*

11.28. Neither the Registrar's statistics nor the Registrar's proposal that he appoint adjudicators from three or more adjudicators nominated by an ANA found their way into the Wallace report.

11.29. We submit that it is incumbent on this Federal Review to closely examine the available statistics for any evidence of bias in the adjudicator appointment process. If, as we say, it is found that evidence of bias does not exist, a clear unqualified statement from the Review to this effect will fully respond to any remaining industry concerns of bias, apprehended or real.

The most recent statistics - NSW

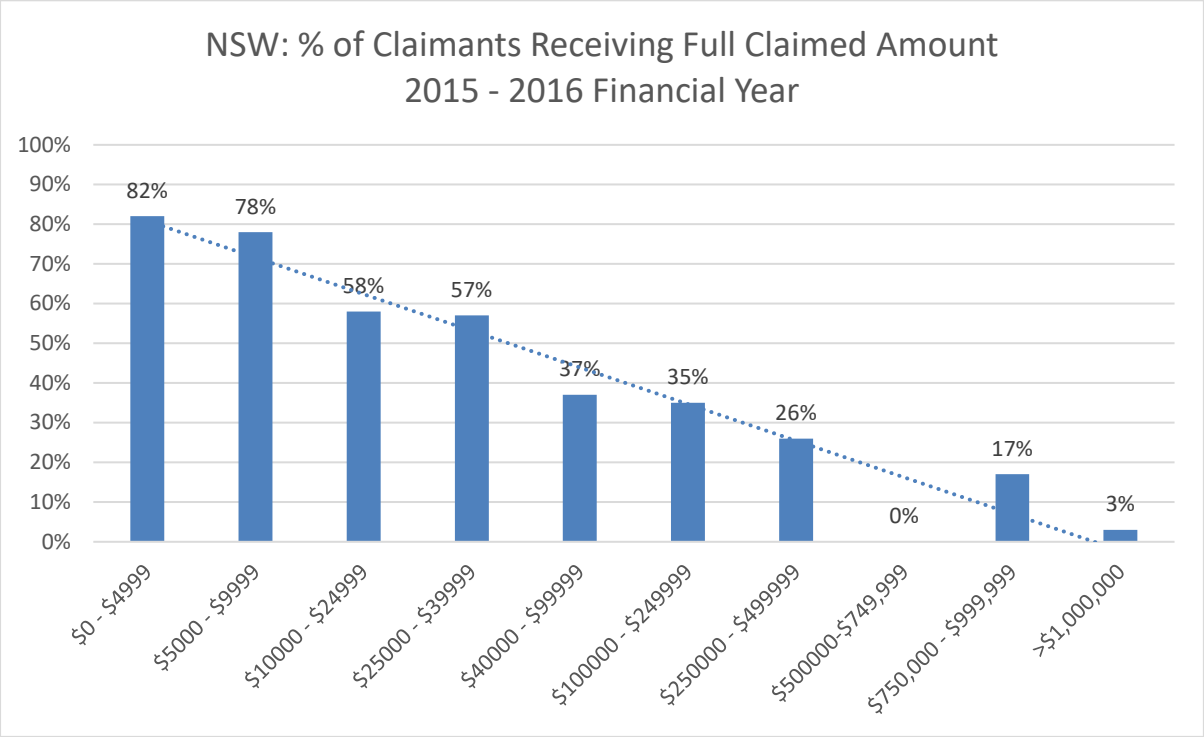
11.30. NSW statistics are published at http://www.fairtrading.nsw.gov.au/ftw/Tradespeople/Building_industry_essentials/Security_of_payment/Authorised_nominating_authorities.page.

11.31. For the last financial year, 1 July 2015 to 30 June 2016 there were 792 applications lodged in the State of which 532 proceeded to adjudication. This is a percentage of 67%.

11.32. For determinations released, the total claimed amount is $104,380,575 and total adjudicated amount is $50,229,433. This is a percentage of 48%.

Bar chart 1 – NSW determined matters statistics 1 July 2015 – 30 June 2016.

11.33. This bar chart is extracted from Table 1 of the NSW Adjudication Activity Annual Report 2015 – 2016. In relation to matters that proceeded to adjudication (matters determined), it shows the percentage of claimants receiving the full claimed amount by the claim range.

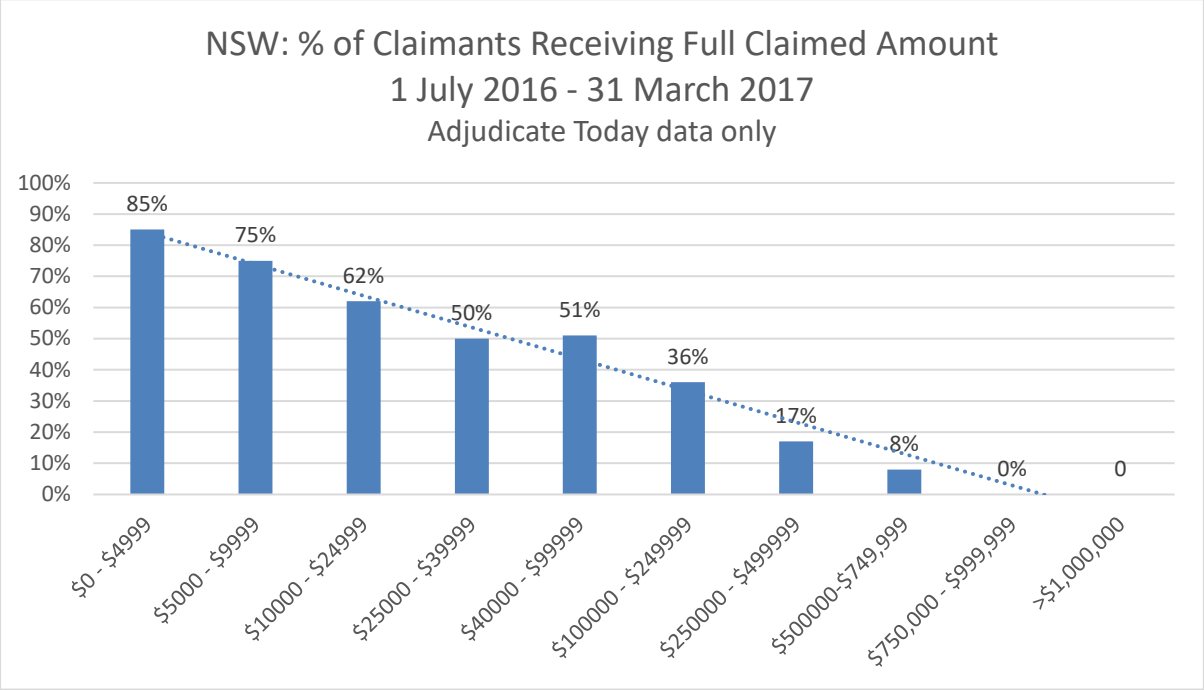


11.34. These results for NSW closely mirror the Qld result pre-2014 amendments.

Bar chart 2 – Adjudicate Today determined matters statistics 1 July 2016 – 31 March 2017

11.35. This bar chart is drawn from Adjudicate Today data provided to the Office of Fair Trading but not yet published by them. It covers the nine-month period 1 July 2016 – 31 March 2017. The data range represents 396 adjudication applications of which 270 proceeded to application. This is a percentage of 68% but given that several applications are still before adjudicators, the final percentage will be closer to 71%[29].

[29] Adjudicate Today traditionally works work to a percentage of 75% (25% fall over rate) but the April 2014 amendments in NSW have caused a spike in the number of invalid applications going to adjudicators as parties argue over jurisdiction issues, particularly issues relating to time in which to make applications – refer para 3.43.



11.36. For determinations released, the total claimed amount is $97,483,324 and total adjudicated amount is $42,261,531. This is a percentage of 43%.

11.37. These results are also very similar to the State based results for the last financial year and the Qld result pre-2014 amendments.

11.38. Given that many payment claims in the lower claim ranges are determined without payment schedules (and hence adjudication responses) being provided, it is inconceivable for any responsible person to mount a case that any of these NSW statistics represent a claimant-friendly approach by adjudicators or that the statistics support a case for bias, either apprehend or actual, in the appointment process by ANAs.

The most recent statistics – Victoria

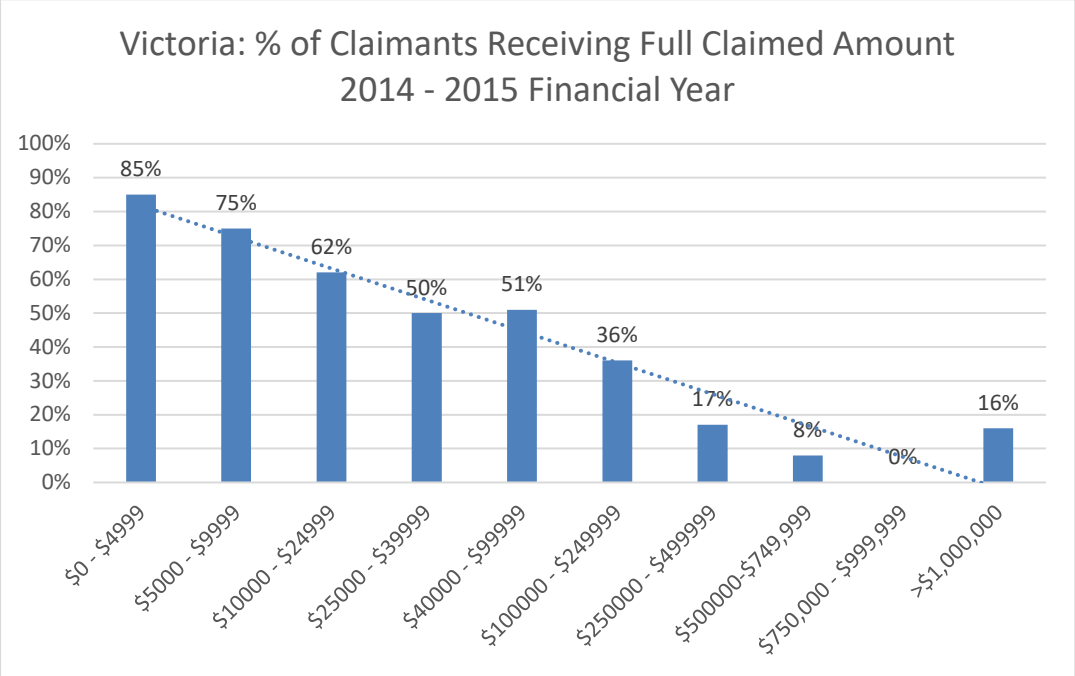
11.39. Victorian adjudication statistics are published at http://www.vba.vic.gov.au/practitioners/security-of-payment-sop/adjudication-activity-statistics.

11.40. The last published statistics are for the 2014 – 2015 financial year. Across the State, there were 333 adjudication applications lodged of which 225 proceeded to determination. This is a percentage of 68%.

11.41. For determinations released, the total claimed amount is $119,384,731 and total adjudicated amount is $29,865,964. This is a percentage of 25%.

Bar chart 3 – Victorian determined matters statistics 1 July 2014 – 30 June 2015.

11.42. This bar chart is extracted from Table 17 of the Victorian Adjudication Activity Annual Report 2014 – 2015. In relation to matters that proceeded to adjudication (matters determined), it shows the percentage of claimants receiving the full claimed amount by the claim range.



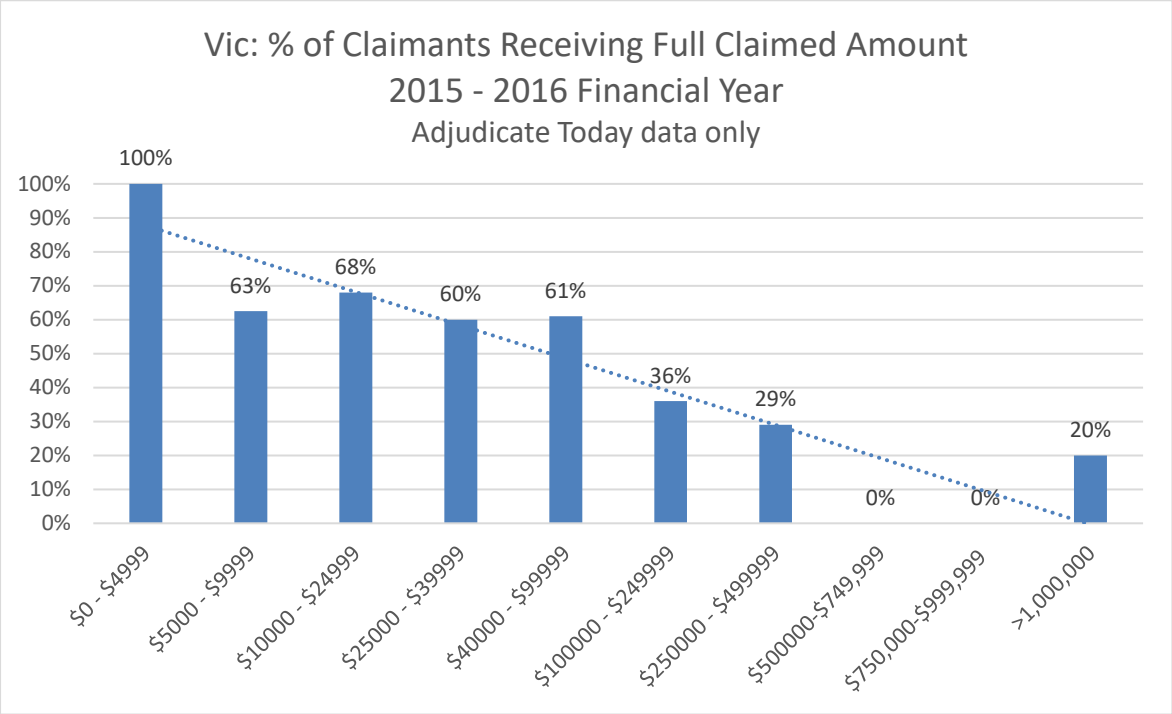
11.43. The percentage of determinations released to the total claimed amount is low at 25% but during the period there were 9 matters claiming in excess of $1,000,000 with several unsuccessful. Otherwise, the results for Victoria are similar to both NSW and Qld (pre-2014 amendments).

11.44. In relation to the last financial (2015 – 2016) year, the Victorian government is yet to publish statistics. However, we have access to Adjudicate Today data. Adjudicate Today managed 136 applications of which 85 proceeded to determination. This is a percentage of 63%.

11.45. For determinations released, the total claimed amount is $48,376,648 and total adjudicated amount is $8,708,421. This is a percentage of 18%. However, there was a single application for claimed amount of $24,063,297 with an adjudicated amount of $35,757. Removing this application from the data, the percentage increases to 36%.

Bar chart 4 –Victorian determined matters statistics 1 July 2015 – 30 June 2016.

11.46. This bar chart is drawn from Adjudicate Today data provided to the Victorian Building Authority but not yet published. It covers the last financial year.



11.47. These results are quite similar to the previous financial year and the data from NSW and Qld, prior to the 2014 amendments.

11.48. At the Adjudicate Today seminar held in April 2017, the Victorian Government representative provided two overheads which together show the claimed amount total and the determined amount total for the 2015 – 2016 financial year. The total claimed amount was $73,337,000 (rounded) and the total adjudicated amount was $20,711,000 (rounded). This is a percentage of 28%. Removing the large single application of $24,063,297 with an adjudicated amount of $35,757 increases the percentage to 42%.

11.49. Given that many payment claims in the lower claim ranges are determined without payment schedules (and hence adjudication responses) being provided, it is inconceivable for any responsible person to mount a case that any of these Victorian statistics represent a claimant-friendly approach by adjudicators or that the statistics support a case for bias, either apprehend or actual, in the appointment process by ANAs.

The most recent statistics – South Australia

11.50. SA, in common with the other States, publishes statistics in a different format again. Their statistics may be downloaded from https://www.sasbc.sa.gov.au/security_of_payment/adjudication-results. The statistics are scant.

11.51. For the last financial year, 1 July 2015 to 30 June 201,6 there were 38 applications lodged in the State of which 24[30] proceeded to adjudication. This is a percentage of 63%.

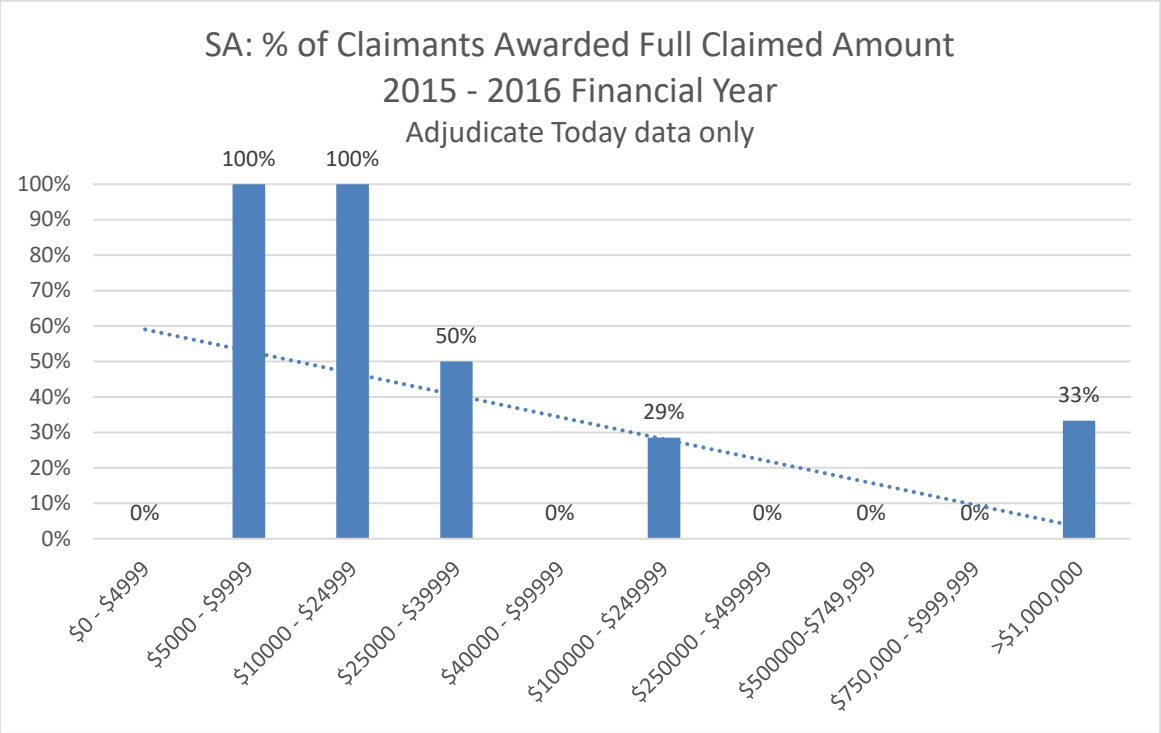
11.52. For determinations released, the total claimed amount is $105,863,253 and total adjudicated amount is $32,660,697. This is a percentage of 31%. However, these statistics are somewhat distorted by several large value applications associated with the construction of the new Royal Adelaide hospital.

[30] The Small Business Commissioner's published figure of 22 applications proceeding to adjudication is incorrect.

11.53. Of the 38 applications in SA, 30 were managed by Adjudicate Today. There was only one determination released for a claimed amount less than $5,000 and that was for a determined amount of approximately 50% of the claimed amount. With this small sample, the bar chart is meaningless for drawing conclusions however, we publish it below.

Bar chart 5 – South Australian determined matters statistics 1 July 2015 – 30 June 2016.

11.54. This bar chart is drawn from Adjudicate Today data provided to the Small Business Commissioner but not published by him, and we understand not to be published. It covers the 2015 – 2016 financial year. The data range represents 30 adjudication applications of which 20 proceeded to application. This is a percentage of 67%.



11.55. Similarly, there was a small number of adjudication applications for the 6-month period 1 July 2016 – 31 December 2016. The small number of adjudication applications (14) render statistical analysis meaningless. The total claimed amount was $30,426,143 and the total adjudicated amount was $157,285. This is a percentage of 0.52%. However, this is the consequence of one very large claim of $29,963,982 for which no determination is released. Eliminating this single claim provides a percentage of 52%

11.56. It is inconceivable for any responsible person to mount a case that these South Australian statistics represent a claimant-friendly approach by adjudicators or that the statistic support a case for bias, either apprehend or actual, in the appointment process by ANAs. However, the statistics raise the suspicion of either a breakdown in the purported education role of the Small Business Commissioner and/or fear of victimisation if subcontractors utilise the Act. During the 18-month period, Adjudicate Today attempted two educational seminars with neither proceeding for want of enrolments. In May 2017, a seminar was conducted by Adjudicate Today resulting from discussions arising from this Review. We have been invited back for a second seminar.

The most recent statistics – Tasmania and A.C.T

11.57. This State and Territory do not publish adjudication statistics and Adjudicate Today data involves very small numbers.

11.58. In Tas, Adjudicate Today data for the previous financial year is for 25 applications and for A.C.T. it is 21 applications. Failure of government to publish data and the small numbers make meaning analysis impossible. However if the Review requests our data, it will be provided.

The most recent statistics – Queensland

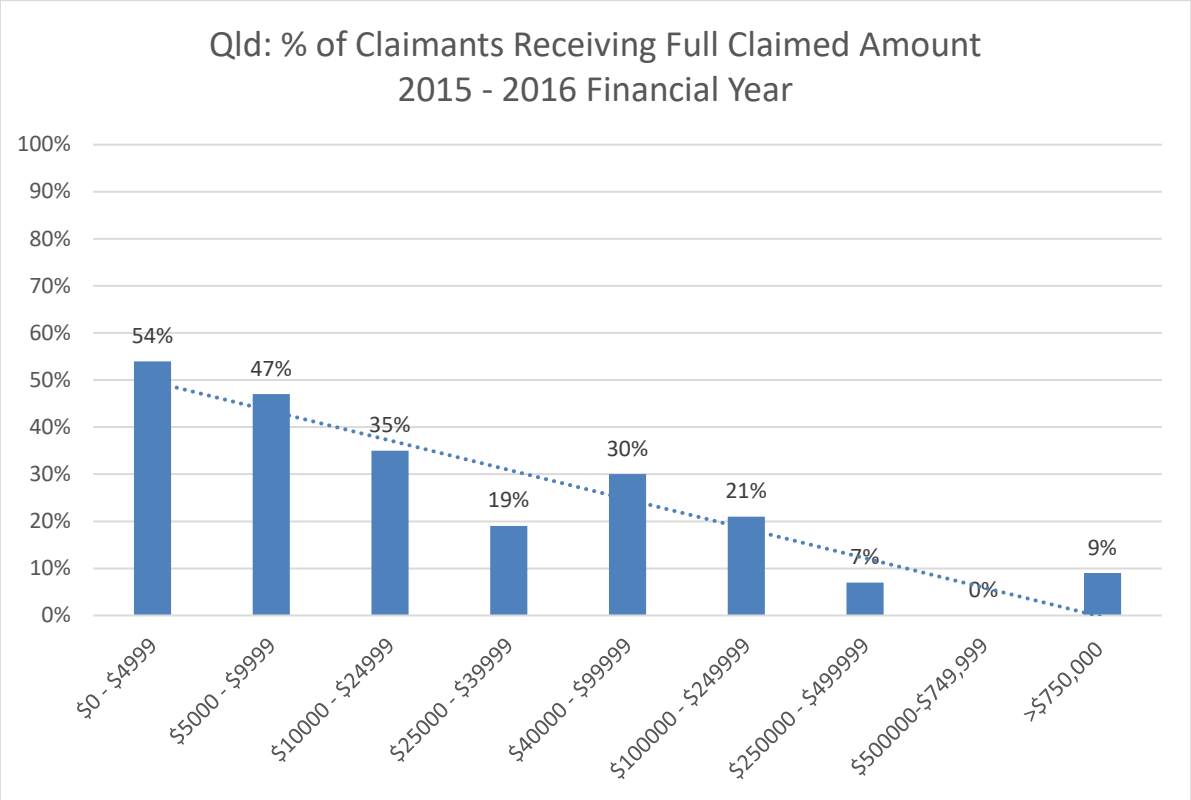
11.59. Our survey has covered the Australian model States for which we have meaningful statistics, other than Qld.

11.60. The latest Qld adjudication registry annual figures are for the last financial year, 1 July 2015 to 30 June 2016. During that year, there were 702 applications lodged in the State of which 363 proceeded to adjudication. This is a percentage of 52%.

11.61. For determinations released, the total claimed amount is $1,186,753,810 and total adjudicated amount is $73,044,499. This is a percentage of 6.2%. However, a large single claim of $994,800,000 distorts the picture. Eliminating this claim results in a percentage of 38%.

Bar chart 6 – Queensland determined matters statistics 1 July 2015 – 30 June 2016.

11.62. This bar chart is extracted from an unnumbered table on page 6 of the Qld adjudication statistics for the 12-month period to 30 June 2016. In relation to matters that proceeded to adjudication (matters determined), it shows the percentage of claimants receiving the full claimed amount by the claim range.

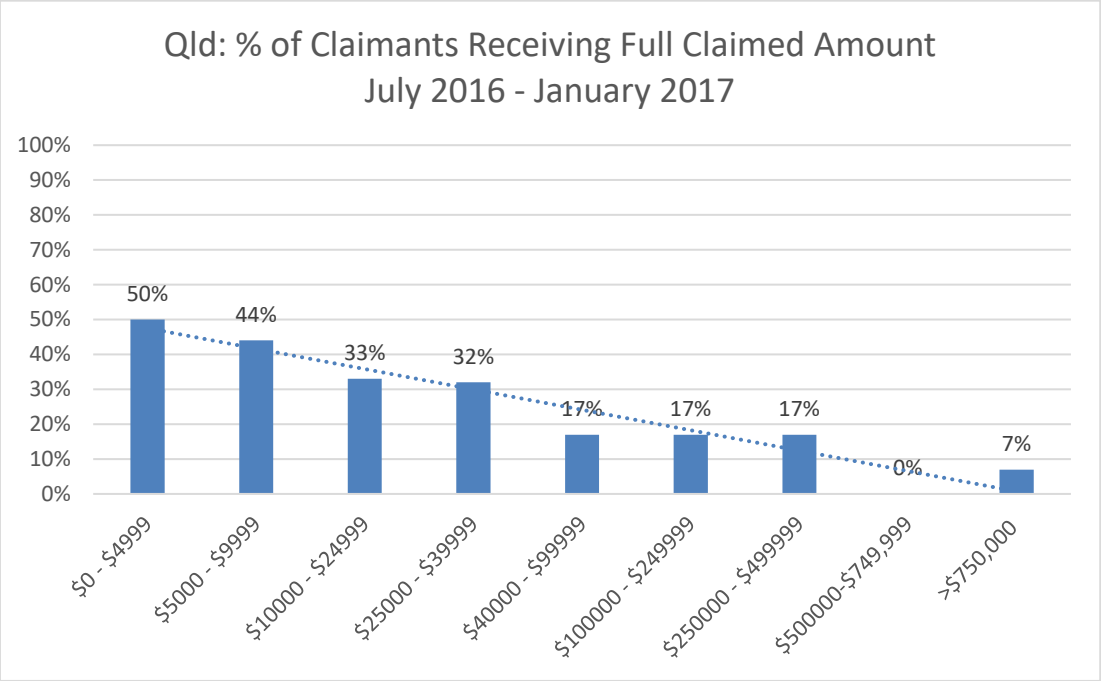


11.63. The Registrar has also published data in relation to the 7-month period 1 July 2016 – 31 January 2017. During the period, there were 353 applications lodged in the State of which 180 proceeded to adjudication. This is a percentage of 51%.

11.64. For determinations released, the total claimed amount is $44,605.711 and total adjudicated amount is $24,754,915[31]. This is a percentage of 55%.

Bar chart 7 – Queensland determined matters statistics 1 July 2016 – 31 January 2017.

11.65. This bar chart is extracted from an unnumbered table on page 7 of the Qld adjudication statistics for the 7-month period to 30 June 2016 to 31 January 2017. In relation to matters that proceeded to adjudication (matters decided), it shows the percentage of claimants receiving the full claimed amount by the claim range.



11.66. These two Qld bar charts are very similar. They both reflect periods after the December 2014 amendments came into effect.

11.67. The charts are quite different to bar charts for the other Australian model jurisdictions and Qld prior to the 2014 amendments.

11.68. In those States the small applications, which are overwhelmingly made by subcontractors and suppliers to the industry and remain undefended as no payment schedule was served (and hence adjudication response provided), have a far higher success rate. Generally, the success rate is over 75%. In Qld, the success rate averages 52%. It is little wonder that subcontractor organisations are deeply concerned by the impact of the amendments on their businesses.

11.69. The main reason for the difference is the absence of free, professional advice to parties seeking to understand the adjudication process and receive information on the nature of information that should be provided in an adjudication application. The abolition of ANAs in Qld has been a disaster for the smaller subcontracting and supply businesses. It is little wonder that the number of Qld industry insolvencies continues at an unacceptably high rate.

[31] We have removed a decision for $600,600,000 (refer para 11.51 above) which was decided in this period. Including it bumps the decided amount above the claimed amount which is a clear distortion.

11.70. The 2014 Qld amendments have proved to be most respondent friendly. They make it far more difficult for a subcontractor to receive advice and make a valid adjudication application with a favourable outcome. It is this fact which is reflected in the contrast between Qld (post- December 2014) amendments and the other Australian model jurisdictions.

11.71. In summary, we submit that the Review find it is inconceivable for any responsible person to mount a case that adjudicator appointments by ANAs are directed towards claimant-friendly adjudicators or that the statistics support a case for bias, either apprehend or actual, in the appointment process by ANAs. We request that the Review make a clear, unambiguous finding to this effect.

The quality of advice and services available to Queensland industry participants making or responding to an adjudication application contrasted to other jurisdictions.

11.72. The Qld amendments also abolished ANAs. As a direct consequence of the abolition of ANAs, industry parties are being denied a wealth of advice, information and assistance in compliance with the statutory procedures of the BCIP Act. Without this procedural assistance, there has been a reduction in the number of successful adjudication applications, particularly of smaller claims, and massive increase in the number of invalid adjudication applications made as a ratio to determinations issued (the fall over rate). We turn to this issue at para 11.76 onward.

11.73. The role of an ANA is not simply to appoint adjudicators. There are many other major responsibilities which must be fulfilled, and exercised subject to ongoing compliance with the CoA established by government regulators.

11.74. To properly understand the impact that following the Qld model and abolishing ANAs would have, we list the responsibilities of Adjudicate Today prior to and post the 2014 Qld amendments. Items that are struck through (~~struck through~~) are no longer performed by Adjudicate Today as a direct consequence of the abolition of ANAs.

~~STATUTORY FUNCTIONS~~

- ~~Accept adjudication applications in various modes: email, lockbox, hand delivery, fax, post at any of our offices in Australia~~
- ~~Nominate adjudication applications to suitable adjudicators~~
- ~~Issue adjudication certificates when requested by a claimant~~

ADDITIONAL FUNCTIONS

1. ~~INFORMATION DELIVERY TO INDUSTRY STAKEHOLDERS~~

- ~~Comprehensive website available to all industry participants containing information on the Act, process flowcharts, templates~~
- ~~Experienced staff available to provide general information and assistance on the adjudication statutory process~~
- ~~Delivery of seminars on the adjudication process to Universities, industry based organisations etc.~~

2. ~~VETTING OF ADJUDICATION APPLICATIONS~~

- ~~Prior to acceptance of an adjudication application, staff check for obvious errors which render the application invalid. E.g. application is out of time, multiple payment claims, work is not within the definition of the Act~~

- ~~Claimant given the opportunity to either not proceed with an obviously defective application, in which case there is no charge made by Adjudicate Today, or to proceed, in which case an adjudicator is nominated~~

3. SERVICE OF DOCUMENTS

- Act as a buffer between adjudicators and parties. It is inappropriate for parties to contact adjudicators and make statements of which other parties are unaware
- Provide a Qld address for service for adjudication applications, responses, further submissions and court documents
- Various methods of receiving documents: Email, Lockbox, hand delivery, fax, post
- Receive and date stamp hard/soft copy documentation from parties
- Request hard copy documentation from parties and follow up when necessary
- Forward documentation to adjudicator in a timely manner
- ~~Undertake general checks of time compliance and report to relevant adjudicator~~

4. LIASING WITH PARTIES

- ~~Provide general information on the adjudication process and updates to parties upon request~~
- ~~Respond to requests for information from parties to adjudication~~
- ~~Direct enquiries to BCIPA if/when necessary~~
- Notify parties of adjudicator's withdrawal if/when necessary

5. REFERRAL OF ADJUDICATION APPLICATIONS TO ADJUDICATORS

- ~~adjudicator panel contained 29 active adjudicators and mentees with varying qualifications and grades~~
- ~~Conflict of interest reviews undertaken prior to referral of adjudications~~
- ~~Adjudication applications referred to suitable adjudicators based on general overview of disputed issues which are matched with adjudicator skills, knowledge and experience~~
- Service of the adjudicator's Notification of Acceptance of an adjudication application on the parties

6. REQUESTS FOR FURTHER SUBMISSIONS

- Request further submissions from parties on behalf of adjudicators
- Answer any enquiries from parties regarding requests from the adjudicator
- Follow up regarding further submissions from parties if no reply received
- Ensure parties do not contact adjudicator directly

7. ORGANISE CONFERENCES OR INSPECTIONS

- If requested by an adjudicator, organise a conference of the parties including venue
- If requested by an adjudicator, organise an inspection of a site or documents

8. DECISION HANDLING

- Receive adjudicators' decisions - ~~upload to web-site~~
- Receive adjudicators' invoices
- Proof read decisions for typographical errors
- Releasing Decision to parties upon payment of adjudication fees
- Providing Decision to BCIPA (if necessary)

- Provide adjudicator with any slip rule requests
- Releasing slip rule amendments to parties

9. INVOICING and DEBT RECOVERY

- Invoicing parties on behalf of adjudicators
- Ensure prompt payment of invoices by following up with parties
- Answer enquiries regarding fees charged
- Multiple payment methods available: cash, money order, electronic funds transactions, credit card

10. ~~DEALING WITH COMPLAINTS FROM PARTIES~~

- ~~Respond to complaints. Detailed complaints procedure described at www.adjudicate.com.au/complaint.php~~
- ~~Adjudication Competency Assessment Panel~~
- ~~Reporting outcome of complaints process to the BCIPA~~

11. ~~LIAISING WITH GOVT~~

- ~~Respond to any enquires of the Registrar or his staff~~
- ~~Extranet reporting on adjudication applications~~

12. APPLICATIONS BY PARTIES TO ADJUDICATION TO THE SUPREME COURT

- Accept service of court documents on behalf of adjudicators
- Confirm relevant parties' position regarding any order for costs against an adjudicator
- Provided no order for costs is sought, file Notice of Address for Service on behalf of an adjudicator

13. ~~ONGOING PROFESSIONAL DEVELOPMENT FOR ADJUDICATORS~~

- ~~Mentoring program for new adjudicators by Peer Review process~~
- ~~Compulsory attendance at our annual adjudicator seminar~~
- ~~Peer Review Committee~~
- ~~Circulation of papers (Practice Notes) written on contemporary issues affecting how adjudicators should consider various issues while adjudicating~~
- ~~In the event a decision is set aside by the Supreme Court, adjudicators are required to write a paper demonstrating their understanding of the reasons for a decision being set aside~~

14. TRAINING

- ~~Professional training, including mentoring program, conducted over 3 months~~
- Access to senior adjudicators for their advice in resolving difficult issues.

11.75. Only a few of the items that are struck through are undertaken by the Qld adjudication registry. As a direct consequence of the abolition of ANAs, industry parties are being denied a wealth of advice, information and assistance in compliance with the statutory procedures of the BCIP Act. Without this procedural assistance, the number of small value claims that are successful in adjudication has fallen dramatically. There has also been a massive increase in the number of invalid adjudication applications made as a ratio to determinations issued (the fall over rate).

The effectiveness of the Queensland Adjudication Registrar in managing adjudication applications contrasted with other jurisdictions.

11.76. The performance of the Qld registry in managing the adjudication process when compared to that of ANAs generally, and Adjudicate Today in particular, is appalling.

11.77. ANAs act as the gatekeepers to adjudication. Prior to accepting adjudication applications, ANA staff check whether the application contains any obvious invalidity as to the process or coverage of the Act. Examples include failure to provide supporting documentation for an application, failure to sign the application form or provide proper contact information or ABN for any party, application is out of time, application relates to work which does not fall within the Act e.g. work performed for the owner of a house in which the owner resides or an application being made before the due date for payment.

11.78. ANA staff are trained to advise industry parties on these and many other potential deficiencies and bring to the attention of claimants any potential problem before an application is accepted and processed. This is entirely in line with the ANA CoAs. This gatekeeping role, which is not performed by Registry staff, is invaluable in assisting parties to make valid applications which comply with the strict and generally confusing requirements of the various Acts. ANA staff never provide advice as to the merit of the arguments presented in a submission.

11.79. Under the Qld appointment regime, all applications received must be accompanied by an application fee ($50 to over $3,000). Applications are scanned and processed without any vetting for invalidity or major deficiency. If registry staff identify an invalidity they continue to process the application, retain the application fee, and then may advise the claimant of the potential invalidity. The Registry describes this approach in their monthly statistics[32] as "a proactive approach". That is untrue. It is a reactive approach which is most inimical to the interests of subcontractors and suppliers to the industry. This reactive approach is contrary to the fundamental principle.

11.80. As applications must be provided to respondents at the same time as presented to the Registry, invalid applications not only cost the claimant the lost application fee and time and cost to prepare but also allows the respondent an additional 4 weeks to prepare the adjudication response. In the meantime, the financial pressure on the subcontractor mounts to the point many become insolvent which might otherwise survive.

11.81. This public-sector approach of the registry represents a human disaster for many subcontractors.

11.82. The basis behind the fundamental principle is providing for parties to have an entitlement to be paid without delay. If claimants aren't making applications which comply with the Act because they don't receive proper advice, previously available from ANAs, then the process is a failure.

11.83. In Qld, the process is a failure. The Registrar's published statistics reveal the stark truth.

11.84. Since the December 2014 amendments, the ratio of decisions released to applications withdrawn (the fall over rate) has dramatically increased. The fall over rate is the acknowledged measure of the effectiveness and accuracy of advice to industry participants who seek to utilise security of payment acts to resolve their payment dispute. It is the ratio of adjudication decisions released to adjudication applications withdrawn.

[32] QBCC Monthly statistics at page 1

11.85. The fall over rate is measured against decisions released and not applications made because a comparison of "applications made" in Qld to the other jurisdictions would not be a comparison of like-with-like. Qld accept anything as an application. Most ANAs only process an application after it vetted for obvious invalidity. With such a major difference in what constitutes an "application", it is inappropriate to use "applications" as the measure.

11.86. Some applications are withdrawn because matters are settled or a claimant concludes their case is hopeless. Traditionally about 20% of applications fall within this category. Other applications are withdrawn because the claimant has made errors in drafting the payment claim and / or adjudication application, revealing a non-compliance with the statutory time frames of the Act or sometimes the application falls outside the ambit of the Act. This second category reflects the quality of advice (efficiency and effectiveness of advice) provided by those staff assisting parties seeking to utilise the respective Act. The majority of withdrawals fall into the second category.

11.87. Adjudicate Today considers 25% an acceptable fall over rate for internal staff evaluation purpose. The Qld fall over rate for the 7 months of data in this financial year is 113.64%. Table 7 is drawn from the Qld Registrar's published statistics and relates to claims that are simple (not complex).

FALL OVER STATISTIC IN QUEENSLAND FOR THE PERIOD 14 JULY 2014 TO 31 JANUARY 2017 - SIMPLE CLAIMS

Date	Decisions Released	Applications Withdrawn	Fall over Rate %	Multiplier above 33.7% average applicable before 2014 amendments	Multiplier above 25% Adjudicate Today objective
5-month period before 2014 amendments					
Jul-14	41	14	34.15%	N/A	N/A
Aug-14	40	16	40.00%	N/A	N/A
Sep-14	39	11	28.21%	N/A	N/A
Oct-14	33	12	36.36%	N/A	N/A
Nov-14	28	8	28.57%	N/A	N/A
Total	**181**	**61**			
Average %			**33.70%**		
7-month period after 2014 amendments					
Dec-14	33	31	93.94%	2.79	3.76
Jan-15	56	22	39.29%	1.17	1.57
Feb-15	24	27	112.50%	3.34	4.50
Mar-15	29	31	106.90%	3.17	4.28
Apr-15	Not published by adjudication registrar				
May-15	Not published by adjudication registrar				
Jun-15	27	20	74.07%	2.20	2.96
Total	**169**	**131**			
Average %			**77.51%**	**2.30**	**3.10**

Date	Decisions Released	Applications Withdrawn	Fall over Rate %	Multiplier above 33.7% average applicable before 2014 amendments	Multiplier above 25% Adjudicate Today objective
12-month period 1 July 2015 to 30 June 2016					
Jul-15	39	40	102.56%	3.04	4.10
Aug-15	37	23	62.16%	1.84	2.49
Sep-15	8	16	200.00%	5.93	8.00
Oct-15	27	21	77.78%	2.31	3.11
Nov-15	32	30	93.75%	2.78	3.75
Dec-15	29	27	93.10%	2.76	3.72
Jan-16	13	32	246.15%	7.30	9.85
Feb-16	29	22	75.86%	2.25	3.03
Mar-16	25	31	124.00%	3.68	4.96
Apr-16	19	23	121.05%	3.59	4.84
May-16	30	31	103.33%	3.07	4.13
Jun-16	21	33	157.14%	4.66	6.29
Total	**309**	**329**			
Average %			**106.47%**	**3.16**	**4.26**
7-month period 1 July 2016 to 31 January 2017					
Jul-16	22	21	95.45%	2.83	3.82
Aug-16	24	18	75.00%	2.23	3.00
Sep-16	31	19	61.29%	1.82	2.45
Oct-16	27	20	74.07%	2.20	2.96
Nov-16	24	31	129.17%	3.83	5.17
Dec-16	15	31	206.67%	6.13	8.27
Jan-17	11	35	318.18%	9.44	12.73
Total	**154**	**175**			
Average %			**113.64%**	**3.37**	**4.55**

11.88. Expressed simply, let us take any statistical group of 100 adjudication applications. Prior to the 2014 amendments, 20 matters referred to Adjudicate Today would not proceed to decision because they settled or suffered an invalidity (a fall over rate of 25% - 20/80). i.e. in any 100 applications, 80 would proceed to decision.

11.89. Under the Registry system (and applying the January 2017 fall over rate of 318% being the last month when statistics are available), to our group of 100 adjudication applications, 76 would not proceed to adjudication (a fall over rate of 317% - 76/24). i.e. in any 100 applications, only 24 would proceed to decision. The physical number of invalid adjudication applications has increased by more than 4.5 times.

11.90. It is difficult to find a word beyond "appalling" to describe how horrific these results are. But words should not be the measure. It is the human misery of the subcontractors which needs to be considered. The plight of subcontractors and suppliers, who are caught up in this clayton Qld Act that tricks them into false hope for rapid payment for services delivered, is ignored. Every industry participant is entitled to know that the BCIP Act adjudication process under the management of the Qld adjudication registrar had 35 applications withdrawn and only 11 decisions released in January 2017. This is 3.37 times more than the Qld average before the Registrar took responsibility and 4.56 time more than the Adjudicate Today 25% management objective.

11.91. These statistics reflect the absence of the expert advice provided by ANAs to industry parties on the Act's procedures prior to lodging an adjudication application. It means that claimants are regularly required to make and pay for two or three adjudication applications before they get it right. Meanwhile respondents retain the disputed money and have an additional month (minimum) to prepare the response.

11.92. The result is to greatly increase the pressure on subcontractors facing insolvency.

11.93. These empirical results evidence the Senate Economics References Committee statement that: *"Any reduction in support services and education may detract from the ability of subcontractors to enforce their rights, and therefore detract from the effectiveness of SOP Acts generally."*[33]

11.94. Adjudicate Today submits that ANA management of the adjudication process as practiced in all Australian model jurisdictions (other than Qld) is far more effective than the Qld model and should be adopted as the basis of federal legislation.

11.95. In addition to the empirical evidence above, there are other reasons to prefer the common arrangements under the Australian model.

11.96. The Adjudication Registry seemingly operates a preferential rotating model of adjudicator appointment across the 107 hopeful adjudicators on its panel. Given that over the last financial year, there was only 363 decisions issued (down from 406 in FY 2015 and 471 in FY 2014), that means an adjudicator is lucky to receive 1 matter every 4 months. There is no opportunity to develop expertise. Applications take longer and therefore cost more to decide as adjudicators not working regularly in the jurisdiction check basic issues from legal resources.

11.97. In contrast, Adjudicate Today deliberately limited our active panel number in Qld to 24 adjudicators, the majority of whom held both legal and building industry professional qualifications. Our adjudicators could expect about 10 matters each year from Qld. They developed enormous expertise and knowledge, much of which is now lost because many experienced adjudicators were horrified by the new Qld regime and have refused to adjudicate under the amended BCIPA. Emotions run very high amongst Adjudicate Today adjudicators in respect of the 2014 amendments.

11.98. If there is any rigour being exercised by registry staff in the nomination of adjudicators, it is a mystery to adjudicators. Again, by way of contrast, all matters referred to adjudicators by Adjudicate Today were strictly analysed for legal argument and practical issues in dispute.

[33] Senate Economics Reference Committee: "Insolvency in the Australian construction industry", December 2015 at para 9.75

11.99. Adjudicator expertise and experience was always matched to the intellectual rigour of the dispute. Our criteria for nomination were open and transparent and available for discussion at our regular seminars. We expressly rejected a preferential rotating model of appointment. Party interests demand something better than that!

11.100. One of the Qld amendments is a prime example of selfish bureaucracy at play and it is at the expense of claimants (subcontractors). Prior to the 2014 amendments, all timeframes in the Act extended to midnight. That meant that ANAs and adjudicators were required and did provide extensive (and expensive) out-of-hours delivery arrangements. The 2014 amendments changed one (only one) time frame being that applicable to the working conditions for registry bureaucrats.

11.101. Many adjudication applications (close to 50%) are filed on the last available day. In Qld that last day has now been reduced by 7 hours and, for those not familiar with the timeframes of the Act, and are late by one minute, the application is invalid. This selfish and self-serving amendment provides yet another reason why a strictly regimented public service bureaucracy is unsuited to manage adjudication applications.

11.102. Competition is important for the successful operation of any federal Act. All Australian governments recognise that there are many functions best carried out by the private sector for efficiency and effectiveness. Government may provide the framework within which the industry may operate, including legislation, policy, procurement systems and related services. However, it is the private sector that largely does the work of designing, building and constructing and then maintaining the infrastructure. Within this model, the ANAs were originally established [under the Act] to enable their services to be provided, largely for the private sector, and funded by the users of the legislation without being a cost burden on the tax paying community.

11.103. ANAs differentiate their product through provision of services such as:

11.103.1. The price charged to the claimant (ANA and adjudicator fees);

11.103.2. The quality of the adjudicator panel retained by the ANA;

11.103.3. The provision of support service (advice on complying with the procedural requirements of the Act);

11.103.4. Prior service (efficient and effective service previously provided by the ANA); and

11.103.5. Policy on the charging of fees.

11.104. We refer to these additional activities as ‘ANA services’. Allowing ANAs to compete on ANA services offered to the industry is entirely legitimate and consistent with competitive commercial practice.

11.105. The narrative, which was erroneously developed, is that some claimants choose an ANA in the expectation that they will derive an advantage by being rewarded with a claimant-friendly adjudicator. This reasoning does not recognise the benefits that competition introduces to the market place or the reasons claimants have for selecting an ANA. A claimant may select one ANA over another for subjective reasons. It is quite rational and plausible to acknowledge that claimants include the ‘ANA services’ provided by that ANA as an important factor when selecting an ANA.

11.106. In other words, as a claimant is not able to gain any advantage regarding the core nominating function carried out by the ANA, it will lodge an application with the ANA that offers the best ANA services. This simple truth underlies all Adjudicate Today marketing activities.

11.107. It is entirely logical, and proper, that claimants differentiate between ANAs according to factors such as fee policy and service support (assistance with accessing forms and guidance through the procedural timelines, web based information etc.). Other factors such as organisational loyalty, may come into play so, for example, a claimant may choose to lodge an application with an ANA operated under the banner of a trade organisation such as RICS, simply because they have some degree of confidence in dealing with that association.

11.108. Claimants should also be free to refer their claims to those ANAs that they believe have the best panel of adjudicators. Clearly an ANA that has senior, experienced and well trained adjudicators would be preferred in the market place because decisions from such adjudicators are less likely to be appealed and they provide legally competent reasons for deciding the amount payable.

11.109. If, despite our submissions, the statistical data drawn from government sources and evidence presented, the Review considers that there is bias either real or apprehended that can't be addressed by clear statements of fact by the Review, the answer is not in the abolition of Authorised Nominating Authorities. The answer is to change the appointment process of adjudicators as initially touted by the Qld Adjudication Registrar.

11.110. The system could operate as follows:

11.110.1. The ANA to which an adjudication application is made shall refer the details of the adjudication application as soon as practical, and within 4 business days to the ABCC for appointment of a person eligible to be an adjudicator.

11.110.2. The ABCC shall appoint an adjudicator from the panel of eligible adjudicators as nominated from time to time by the relevant ANA.

11.110.3. The ANA shall provide the ABCC with such details of the adjudication application as are prescribed by the ABCC for the purpose of the Commissioner appointing an eligible adjudicator. The ABCC may prescribe the number of adjudicators to be nominated by an ANA for each application (we propose three).

11.110.4. The ABCC may require an ANA to nominate additional adjudicators if those originally nominated are considered unsuitable or are unavailable.

11.111. With these simple legislative changes, parties can be assured that the appointment process is managed impartially by the ABCC and ANAs can continue providing their advice to industry participants and services to adjudicators. It can be expected that the fall over rate will remain below one-third and the cost of adjudicating matters will be contained.

Conclusion

11.112. Adjudicate Today submits that the removal of the procedural advice and support provided by ANAs would undermine the effective operation of the Act and extend a massive procedural advantage to respondents through the adjudication process.

11.113. The abolition of ANAs would increase the number of building industry insolvencies and result in further delays in payments to subcontractors.

12. QUESTION 12: What is your experience regarding the quality of adjudication decisions?

12.1 The standard of adjudicator training varies greatly between jurisdictions, ANAs and trainers.

12.2 The Adjudicate Today training modules were originally developed in 2000 for the NSW Act, amended extensively in 2002 and copied into the Qld regulations in 2004.

12.3 Since that time there have been many quality enhancements to the Adjudicate Today training, including improvements to the curriculum, appointment of new trainers who are known to the Review and external oversight and examination by University of NSW academics from the Faculty of the Build Environment.

12.4 Any candidate who hopes to become an accredited adjudicator must be familiar with the construction industry and construction contracts. They must understand the terms generally used in the industry. They must have relevant tertiary qualifications. He or she must be computer literate and have access to communication tools such as the internet. These prerequisites are strictly enforced.

12.5 Face-to-face teaching extends over 3-days and is conducted by the Chief Trainer (one of the Adjudicate Today Chief Adjudicators) and other trainers, including Professor Adrian Ashman, Professor Emeritus University of Qld and previously permanent member of the Qld Civil and Administrative Tribunal (QCAT), on how to construct and write an adjudication decision that is concise and comprehensible to the parties. The course also features at least one eminent guest speaker and a representative from the regulator of the applicable State or Territory.

12.6 While face to face teaching is 3-days, time to complete the course is generally over 3-months, including preliminary study and preparation of an assignment, the face-to-face teaching, examination, take home assignment and, if the course is passed, mentoring by senior adjudicators for at least two matters before appointment to a Panel.

12.7 Since the 2014 amendments, Qld has conducted standard State-wide training however, we do not consider the quality of adjudication decision is better in that State. In the absence of a mentoring program and receipt of regular work, as highlighted at para 11.96 above, there is much to be criticised. By way of example of a poor decision.

12.8 The extracts below are from a recent decision for a payment claim of $5,446.90 (Incl GST). The decision runs to 16 pages and these extracts dealt with the questions as to what interest rate was applicable and which party should pay the costs of the adjudication.

> *"INTEREST RATE*
>
> *59) Pursuant to s15(2) and s15(3) of the Act, the interest is payable on the unpaid amount of a progress payment that has become payable:*
>
> *a) For a construction contract to which the Queensland Building and Construction Commission Act 1991, s67P applies because it is a building contract, interest is payable at the penalty rate under that section, otherwise*
>
> *b) At the greater of:*
>
> *i) The rate prescribed under the Civil Proceedings Act 2011, s59(3) for a money order debt, and*
>
> *ii) The rate specified under the contract.*
>
> *60) The contract is a construction contract to which the Queensland Building and Construction Commission Act 1991, s67P applies. Therefore, the interest rate is:*
>
> *a) The sum of 105 a year and the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills, or*

b) The rate provided in the contract if it is larger.

61) The published rate for 90 day bills at all material times was 1.79% per annum (https://www.rba.gov.au/statistics/tables/index#interest rates accessed 28 January 2017).

62) There was no interest rate agreed between the parties.

63) I decide that the rate of interest is 11.79% per annum."

(The section in bold print is as per the original document.)

12.9 Following the above, the adjudicator concludes his decision by apportioning his fees as follows:

"ADJUDICATOR'S FEES

64) In deciding the proportion of my fees payable by the claimant and the respondent I considered that both parties, due to their inexperience in dealing with the BCIPA, have contributed equally to time (sic) it has taken me to decide this matter.

65) I decide the claimant is liable for 50% and the respondent is liable for 50% of the Adjudicator's fees and expenses."

(The section in bold print is as per the original document.)

12.10 The adjudicated amount was the full $5,446.90 (Incl GST) as claimed. From the perspective of the claimant, a sub-contractor who the adjudicator has decided is inexperienced in these matters, what has he gained from his experience of adjudication? Firstly, despite the fact, that the adjudicator has decided the claimant was entitled to the full amount of its claim, it is penalised by having to pay half of the adjudication costs. As to why there is no indication. However, the adjudicator has generated 16 pages of print in making his decision. Secondly, what would a sub-contractor understand after having read the adjudicator's decision of the applicable interest rate. Even though the adjudicator has realised that both parties are inexperienced in these matters there has been little, if any, attempt to make his decision intelligible to either party. Decisions such as this indicate there is room for substantial improvement in the quality of adjudication decisions.

12.11 How might decisions be improved?

12.12 In short, adopt the Adjudicate Today approach which ensures parties have a professional industry background and are familiar with industry terms. They must hold relevant professional qualifications, pass a pre-qualification check of ethics, and graduate in a course which extends over a 3-month period and includes an extensive mentoring program.

12.13 The course should be conducted by very experienced senior adjudicators and include a significant emphasis on the writing of decisions, starting with a consideration as to who the decision is to be directed to. If the parties are, as the adjudicator found in the case above, inexperienced, then plain English is imperative, especially if the intent is to educate parties further about the Act and its value to them. As for specific guidance on matters such as what is, essentially, judicial writing, there is a plethora of information to be found on the internet as well as from the reading of well written judicial decisions. Further a template should be mandatory for adjudication decisions, if for no other reason than simply to make them more readable.

12.14 Each ANA should also establish a peer review committee of senior adjudicators to assess the quality of decisions issued by the applicable ANA. However, any review may only occur after the decision has issued as to avoid any potential interference with the statutory obligation of the adjudicator to make an independent decision. Additionally, all adjudicators should have access to common legal resources, such as Adjudicate Today's Annotated Building and Construction Industry Payments Act (NSW & Qld) service. This monthly subscription service by Adjudicate Today provides the law and links to cases for each section of the applicable Act.

13. **QUESTION 13:** ***Should legislation set out minimum requirements for the eligibility to become an adjudicator?***

13.1. Yes.

13.2. There are many differences in the requirements between States and Territories that can cause significant uncertainty. E.g. former High Court Justice Michael McHugh is not eligible to be an adjudicator in SA because he does not have a university qualification in law having graduated via the Solicitors Admission Board path.

13.3. The Wallace Report is helpful, stating:

"In consultation with industry stakeholders, the elements necessary to obtain an adjudication qualification as contained within Schedule 1, Part 2 of the Building and Construction Industry Payments Regulation 2004 should be amended with at least the following additional elements:

- *Overview of the law of contract;*
- *Analysis of common standard form building contracts;*
- *Analysis of costs and claims in the building and construction industry;*
- *Detailed analysis of building construction claims and contractor entitlements;*
- *An overview of the law of building and construction; and*
- *A detailed analysis of the ethical obligations of an adjudicator."*[34]

13.4. Qualifications should be set out in the Act generally such "as relevant tertiary qualifications" and "significant amount of experience in dealing with construction contracts" rather than the specificity found in the SA Act.

13.5. Adjudicators should be registered by the ABCC or relevant Commonwealth body with responsibility for oversight of the Act which would interpret these general terms in a real-world situation when considering an application for registration.

13.6. As occurs in most ANAs, with time and experience, an adjudicator would have the opportunity to gradually upgrade permitting him, or her, to consider more detailed matters.

13.7. In summary, the overall aim would be to make the whole process both uniform and transparent to engender stronger community support for the adjudication process.

[34] Wallace Report at page 255

14. QUESTION 14: Should certain claims be excluded or carved out from the Act?

14.1. No.

14.2. The fundamental principle does not distinguish between the nature of the claim.

14.3. The need to be paid on time does not distinguish between the nature of the claim.

14.4. The threat of insolvency does not distinguish between the nature of the claim.

14.5. The provisions in the Victorian Act are tortuous and literally impossible for a non-legally qualified person to follow. Many adjudication applications that could have proceeded in other States have been held invalid because of the confusing Victorian provisions.

14.6. Such provisions are contrary to the aims and objectives of security of payment legislation and the fundamental principle.

15. QUESTION 15: Should legislation be amended to allow a reference date to accrue following termination of the contract?

15.1. Yes.

15.2. The High Court decision in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*[35] impacts the cash flow of contractors and subcontractors by the loss or suspension of further reference dates following a purported termination of the contract or taking-over of the works by the principal[36].

15.3. Further the interpretation of section 8(2) of the Act[37] in *Southern Han* by its exclusion of 'default' reference dates[38] where there are express contractual reference dates[39] poses cash-flow issues for contractors in the period immediately following the completion of works up until such time as they are able to submit a final claim (typically after completion of the relevant defects liability period). See by way of illustration, the recent Supreme Court decision in *Fairfield City Council v Abergeldie Contractors Pty Ltd*[40].

15.4. The 'rise' of the contractual reference dates resulting from the current emphasis of reference dates as a jurisdictional challenge will encourage complexity in relation to the drafting of contractual terms governing the timing of payment claims, the identification of further barriers to reference dates arising and an increased risk that adjudicators will fall into jurisdictional errors in relation to reference dates, resulting in decisions being void, despite adjudicators best efforts and the considerable cost to the parties (particularly claimants). These outcomes discourage use of the procedures set out in the Act and diminish its ability to achieve its cash-flow objective.

15.5. It is submitted that amendments to the legislative definitions of reference dates that elevate the 'default' reference date would go a long way to assist this issue. For consideration, see the suggested amendments to section 8 below:

> **8 Rights to progress payments**
>
> (1) On and from each reference date under a construction contract, a person:
>
> (a) who has undertaken to carry out construction work under the contract, or
>
> (b) who has undertaken to supply related goods and services under the contract,
> is entitled to a progress payment.
>
> (2) In this section, ***reference date***, in relation to a construction contract, means:
>
> ~~(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or~~
>
> (~~b~~a) ~~if the contract makes no express provision with respect to the matter~~ 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; and
>
> (b) any other date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract.

[35] [2016] HCA 52
[36] As referenced in the Issues paper, Q15.
[37] Building and Construction Industry Security of Payment Act 1999 (NSW)

[38] Under section 8(2)(b) of the Act and equivalents in other 'East Coast' security of payment legislation.
[39] Under section 8(2)(a) of the Act and equivalents in other 'East Coast' security of payment legislation.
[40] [2017] NSWSC 166

15.6. As the ‘default’ reference date is not conditional upon the continuation of the construction contract, it could continue to accrue post termination or during any period where payment rights were suspended (i.e. when the works are taken out of the contractor’s hands) and, it would continue to accrue during periods that are often not covered by contractual reference dates e.g. the period following practical completion.

16. **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?**

16.1. At their seminar in April 2017, Adjudicate Today adjudicators felt that this question is best left to industry representatives for comment.

17. **QUESTION 17: On what basis should such timeframes to be regarded as unreasonable?**

17.1. At their seminar in April 2017, Adjudicate Today adjudicators felt that this question is best left to industry representatives for comment.

18. **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?**

18.1. At their seminar in April 2017, Adjudicate Today adjudicators felt that this question is best left to industry representatives for comment.

19. QUESTION 19: Should all payment claims include the endorsement that "this is a payment claim made under the Act"?

19.1. Yes.

19.2. In response to allegations of victimisation of claimants who made use of the endorsement, the objective of the amendment to the NSW Act was to remove the requirement that a payment claim state it is made under the Act.

19.3. However, as observed at para 3.31, there were some clear benefits to the endorsement, including:

19.3.1. It evidenced the intention of the claimant was to engage the Act;

19.3.2. It created a path for escalation of a claim by adding the endorsement if that was not the usual practice;

19.3.3. It was commended by the Court[41];

19.3.4. It had not been interpreted strictly or technically[42]; and

19.3.5. Its removal served no obvious actual purpose and has been criticised by the courts[43].

19.4. The motivation or logic in removal was flawed in both execution and understanding.

19.5. Firstly, given the use of the endorsement was common place, the ire existed in 2003 not 2017.

19.6. Secondly, for an adjudication to proceed absent a payment schedule, a notice of election must be issued pursuant to section 17(2) of the Act. That provision requires by section 17(2)(a) that the notice advise it is issued pursuant to the Act. Given that a payment claim under the amended Act can be a vaguely worded document with minimal requirements, a respondent can readily overlook the legal importance. This means that from the first time the respondent is aware the Act is engaged, it has only 5 business days to provide a payment schedule.

19.7. Section 8 of the Act provides that a progress claim can only be made in relation to a reference date, meaning the date on which a person is entitled to be paid under the contract. Unless the contract provides differently, the default position is the last day of the month. Therefore, in the majority of contracts, only one progress claim per month can be made. This requirement is applied strictly by the Supreme Court.

19.8. The original section 13 of the NSW Act provided that a person claiming entitlement to a progress claim can make a payment claim provided it contained three elements:

19.8.1. Identify the work to which the claim relates;

19.8.2. Indicate the amount claimed; and

19.8.3. State the claim is made under the Act.

[41] Kingston Building Pty Limited v Warners Bay Developments Pty Limited [2009] NSWDC 203
[42] Hawkins Construction v Macs Pipework [2002] NSWCA 136
[43] His Honour McDougall J in Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602 at [3]

19.9. The third requirement was deleted.

19.10. The first unintended consequence was that any correspondence between subcontractors and contractors in relation to an indicated payment for identified work may be argued to constitute a payment claim under the Act[44]. This causes uncertainty in the minds of both claimants and respondents and great problems for adjudicators who need to determine which of any number of documents is the payment claim for the purpose of satisfying the requirement that only one payment claim can be made each month. These arguments create new appeal grounds to the Supreme Court.

19.11. If the claimant punts on the wrong document, the adjudicator does not have jurisdiction to proceed to make a determination. This together with difficulties over understanding the due date of payment amendment to the NSW Act have led to an increase in the Adjudicate Today fall over statistic in NSW from an average of 25% to an average of 30%.

19.12. Claimants are being denied payment as they have issued correspondence which can be interpreted as more than one payment claim per reference date. Similarly, all prudent respondents are now required to issue a payment schedule in response to all possible payment claims. The risks attendant on not providing such a document is described immediately below.

19.13. The second unintended consequence was seriously prejudicial to respondents. Sections 15 and 16 of the Act provide that in relation to adjudication streams 2 and 3 (described at para 3.37), a claimant may either go to adjudication or seek judgement from a court for the claimed amount as a debt due to the claimant. If the claimant proceeds to court, the respondent can't bring any cross claims or raise any defence in relation to matters arising under the construction contract.

19.14. In other words the NSW Act, as it was amended, allows claimants in adjudication stream 3 to proceed directly to any court of competent jurisdiction without any warning whatsoever to the respondent. The application to court may be based on a payment claim never considered as such by the respondent who will face a legal proceeding in which they can't raise defences!

19.15. This is not an issue in relation to adjudication streams 1 and 2 because the respondent is clearly treating a document as a payment claim having issued a payment schedule.

19.16. The endorsement provision should be retained in a federal Act.

[44] The possible confusion as to payment claims made by head contractors to principals should be minor due to the requirement to provide a supporting statement.

20. QUESTION 20: Should such payment claims outline the period in which to respond and the potential consequences?

20.1. Our view for retention of the endorsement does not preclude amending the brief statement by the addition of words to the following effect:

> *'If you intend to withhold payment of any part of the claimed amount, the Act requires you to provide a payment schedule within 10 business days of receipt of the payment claim.'*[45]

20.2. However, inclusion of the words should not be mandatory or failure to include result in an invalid payment claim. The exception to this comment will be addressed with questions 24 and 25.

20.3. By way of a practical issue. Almost all business use accounting software and there are many different packages. Most invoices are generated by the software and there is a field at the bottom of the invoice template where the endorsement is inserted. We understand that some packages severely limit the number of available characters such that a longer endorsement could not be readily accommodated.

20.4. Any additional mandatory requirements for endorsement payment of claims will lead to more jurisdictional challenges on the basis of the form of the payment claim.

20.5. Except in Tas[46], the Act only applies to experienced construction participants who should be familiar with the operation of the Act and therefore should be familiar with the period in which to respond and the potential consequences if they don't.

[45] The additional information should not have to be precisely worded just explain the intent of the requirement.

[46] The Tasmanian Act has extended periods for inexperienced home owners to make submissions – refer Question 25

21. QUESTION 21: Should an adjudicator's decision/determination be published online?

21.1. This issue is vexed and needs to be treated with caution.

21.2. The benefit to the public is that the process becomes more transparent.

21.3. For adjudicators, they can learn from their peers but, as importantly, parties can obtain, inter alia:

21.3.1. A better understanding of the process.

21.3.2. Guidance as to which parties have frequently been involved in adjudications. This may assist either party in making a commercial decision, whether to contract with another.

21.3.3. Assist in the grading of adjudicators allowing for the better allocation of disputes.

21.4. However, the potential for reputational risk to respondents and the ability of law firms and others to track those claimants which utilises security of payment legislation for the purpose of not giving them work (victimisation) can't be underestimated.

22. **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?**

22.1. Yes.

22.2. This issue was considered in the Wallace report which recommended that the BCIP 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. Mr. Wallace said:

> *"In my view however, if an adjudicator has committed a jurisdictional error of law in part of an adjudication decision which does not affect the whole of the decision, the Act should expressly provide a court with the power to be able to sever that affected aspect of the decision with the balance to remain enforceable. The parties may have already expended significant costs on the adjudication and court processes. If the court is able to sever the affected part of the adjudication decision then there will be significant cost advantages in doing so."*[47]

22.3. In many jurisdictions, the ability of the courts to set aside adjudication decisions for jurisdictional errors has resulted in an outcome that may be quite unfair. For example, an adjudication decision for one million dollars may be set aside because the adjudicator made a jurisdictional error in respect of one variation of say $10,000. Despite the balance of the decision being without error, the common law provides that a jurisdictional error infects the whole of the decision.

22.4. The 2014 amendments to the Qld legislation provide for the Court to sever the part of an adjudicator's decision that is affected by jurisdictional error and allow the balance of the decision to stand. The amendment has successfully addressed this previously undesirable outcome to the benefit of the industry generally.

22.5. The amendment is consistent with the fundamental principle.

[47] Wallace Report at page 224

23. 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?

23.1. Yes, applying to all monies owed.

23.2. Adjudicate Today has consistently advocated the establishment of a statutory construction trust applying to all monies owed with payment disputes resolved under Security of Payment legislation.

23.3. For example, in our submission to the Collins Inquiry in NSW, we recommended a charge in favour of subcontractors over the payments made or to be made by the principal to the contractor. The submission was as follows.

> *"At present, the principal pays the contractor money which includes the subcontractors' money (the value of work carried out by the subcontractor). The subcontractors' money immediately becomes the contractor's own money. The contractor can spend it as the contractor pleases. The contractor can use it to reduce or discharge a mortgage which the bank may have over the home of a director of the contractor (as security for the bank guarantee that the contractor has provided to the principal), to pay directors or employees generously, to buy property or cars or to invest in any venture, even one through a tax haven. There is no restriction on how the contractor deals with the subcontractors' money.*
>
> *Obviously, the contractor should hold the subcontractors' money in trust for the subcontractor. The subcontractors should have a charge over that money.*
>
> *Subcontractors should have a charge not only over the subcontractors' money paid by the principal to the contractor but also over the subcontractors' money yet to be paid by the principal. The contractor should only own and be entitled to deal as the contractor pleases with so much of the money received from the principal as exceeds the subcontractors' money.*
>
> *In Australia, such a charge is commonly called a 'deemed trust'. So much of the money received by the contractor from the principal as is due to the subcontractor is held by the contractor in trust until the subcontractors are paid. The NSW government regularly (but not always) places a deemed trust clause into construction contracts for the protection of subcontractors.*
>
> *The current GC 21 contract form for construction, used by many NSW government agencies, has a requirement for monies to be held in trust by head contractors for the benefit of subcontractors who have undertaken the work or supplied materials. This form of contract can be found at http://www.procurepoint.nsw.gov.au/before-you-supply/standard-contract-templates-0/standard-form-documents/gc21-edition-2. Clauses 33.7 to 33.9 provide:*
>
> *".7 If the Contractor receives or retains security in cash or converts security to cash under any of its Subcontracts, that security is held in trust by the Contractor from the time it receives, retains or converts it.*
>
> *.8 If the Contractor receives payment under the Contract for, or on account of, work done or Materials supplied by any Subcontractor, and does not pay the Subcontractor the whole amount to which the Subcontractor is entitled under the relevant Subcontract, the difference is held in trust for payment for the work done or Materials supplied.*
>
> *.9 The Contractor must deposit all money it receives in trust, as described in clauses 33.7 and 33.8, into a trust account in a bank selected by the Contractor no later than the next Business Day, and:*

.1 the money must be held in trust for whichever party is entitled to receive it until it is paid in favour of that party;

.2 the Contractor must maintain proper records to account for this money and make them available to the Subcontractor on request; and

.3 any interest earned by the trust account is owned by the party which becomes entitled to the money held in trust."

The concept would be far more effective and extend to the private sector generally if enshrined in legislation.

The Builders Lien Act [1997] of British Columbia creates such a trust. Section 10 provides:

"(1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust."

One major advantage of enshrining the deemed trust in legislation would be that subcontractors could sue the directors of a contractor if they paid out money in breach of the trust. Subcontractors may bring a class action. It may even be possible to trace the funds. Another advantage is that the deemed trust would not fall foul of Commonwealth laws governing corporations and insolvency.

Use of deemed trusts to protect payments ear marked for subcontractors, can be helpful in the event of contractor insolvency too. Where a company is subject to external administration under the Corporations Law, a receiver has the right to gather up all monies under held by the insolvent entity for the purposes of paying creditors.This includes amounts held by the contractor which, as we have explained, includes amounts due for payment to subcontractors. It is not right that the receiver should appropriate these monies and the use of deemed trusts quarantines that money for the benefit of the subcontractors it was meant for.

Legislating a system of charges over payments to contractors is not radical. We all allow the bank to take a charge (in the form of a mortgage) over our homes in return for a loan. So too do contractors allow charges over their assets in return for business loans. Opponents of the deemed trust and charge option are not credible as the application of deemed trusts reflects standard commercial and financial practice."

23.4. The NSW Collins Inquiry recommended the introduction of a statutory construction trust. This proposal may be summarised as consisting of a statutory provision specific to the industry under which payments from the principal downwards must be paid into separate bank accounts and which funds are then held in a series of cascading trusts.

23.5. The Report described the essential features of this trust scheme[48] as follows:

23.5.1. The principal is to be required to pay the moneys agreed to be due and payable to the head contractor within 15 days of the receipt of a progress payment in the proper form.

[48] Collins Ibid at page 158

23.5.2. The head contractor is to pay to the subcontractor or subcontractors as the case may be, the amounts not in dispute and properly set out in the progress payment.

23.5.3. The payments from the head contractor to the subcontractor and suppliers cascading downward should be paid into and retained in a separate bank account.

23.5.4. If there is a dispute as to what is due and payable either to the head contractor by the principal or by the head contractor to one or more of the subcontractors, then such dispute is to be dealt with in accordance with the provisions of SOPA. Once the principal, the head contractor or the subcontractor have paid moneys into the relevant respective construction trust account, then each beneficiary claiming to be entitled to the payment of moneys out of that account is entitled to call upon the trustee to provide up-to-date details of trust account details in the form of copies of the current account balances.

23.5.5. *After payment by the principal into the original trust account, the contractor shall be entitled to deposit the progress payment into an account with any one or more of the authorised investments set out in the NSW Trustee Act 1925 and if the trustee elects to do so it must ensure that the account to which the funds are transferred continues to be described as a trust account for payment to subcontractors and suppliers in respect of the particular project name.*

23.6. This proposal was endorsed following extensive industry consultation and an exhaustive analysis of similar schemes which have operated in other jurisdictions for many years, most notably Canada and the U.S.

23.7. Mr Collins QC is a renown legal scholar in the law of trusts and his proposals were specifically to deal with construction industry insolvency.

23.8. Unfortunately, the NSW Government response has been limited to establishing a trial of Project Bank Accounts (PBAs) with larger projects in which they are the prime contractor. Despite several years of trial, the results have not been publicly reported. Other States, such as WA and Qld, are also experimenting with PBAs. However, PBAs don't provide a complete answer although they are a step in the right direction.

23.9. We consider the Collins Report proposals offer a simple, cost efficient and fair means of dealing with the insolvency problem and the peculiar circumstances of the industry. Coupled with stronger rapid adjudication processes as discussed throughout this submission, the introduction of this scheme is long overdue and would provide substantial assistance in reducing the number of industry insolvencies.

24. 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?

24.1. Yes, refer question 25 below.

25. 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?

25.1. Yes, a similar structure. We support extending the Act to include circumstances where a domestic builder enters a construction contract with a home owner in relation to a residential building.

25.2. It is not fair that a house builder is denied the opportunity to avail itself of the right to make a progress claim under the Act where such claims can be made by the house builder's subcontractors on the same housing project.

25.3. Equally it is not fair if a home builder can pursue a claim against a home owner under security of payment when the home owner may have a perfectly valid payment claim for rectification work or otherwise against the home builder.

25.4. However, there is a substantial difference between adjudication where a home owner is the respondent and adjudication where a contractor, principal or government is the respondent. In the latter case, a contractor, principal or government is expected to be aware of security of payment laws while it is not reasonable to expect a domestic home owner to have similar knowledge.

25.5. In 1999, this issue was considered extensively by the framers of the original NSW legislation. Recognising the "all-in" nature of the proposed Bill, there was a strong political view that imposing such obligations on unsuspecting home owners would create a storm of protest and backlash.

25.6. Seventeen years later the same concerns remain other than in Tas which introduced statutory adjudication for residential payment disputes without backlash.

25.7. Recognising the concern about lack of knowledge about security of payment laws, the Tasmanian Act allows residential dispute respondents 20 business days (or shorter period if stipulated by contract) after a payment claim is received to provide the payment schedule. This is an additional 10 business days to other payment claim responses.

25.8. Residential building work is work where:

25.8.1. The claim relates to a residential structure to be built on land; and

25.8.2. The respondent is the owner of the land; and

25.8.3. The respondent is not a building practitioner.

25.9. A "Residential Structure" means a building or structure that is a Class 1 or a Class 10 building or structure within the meaning of the Building Code of Australia, as in force from time to time. A Class 1 building is a single dwelling, boarding house, hostel or the like. A Class 10 building is a non-habitable building or structure e.g. private garage, swimming pool etc. The Australian Building Codes Board publishes the Building Code of Australia and has provided Adjudicate Today with an extract of the Class 1 and Class 10 building classifications from the Code.

25.10. We recommend four further enhancements to the Tasmanian model.

25.10.1. A payment claim served by a home builder in relation to residential building work must be endorsed as a payment claim as is the current law AND be accompanied by a statement which would be prepared by the ABCC or similar government body oversighting operation of the Act. The statement, on an official letterhead and available in other languages, should advise home owners of their liability under the Act, the consequences of ignoring the payment claim and where further information can be obtained in relation to responding to the payment claim.

25.10.2. A home owner should be able to make a counter payment claim against the builder in response to the originating claim.

25.10.3. A home owner should be able to initiate a payment claim against a home builder in relation to a payment dispute over work performed.

25.10.4. A home builder should be able to make a counter payment claim against the home owner in response to the originating claim.

25.11. In summary, we propose the following model:

25.11.1. If a party (the claimant) makes a payment claim (whether in contract, in tort or pursuant to a statutory warranty) against another party to the Contract (the respondent) for payment of an amount (whether a debt or damages) allegedly due under or in connection with the contract and:

25.11.1.1. the respondent refuses to pay the claim in whole or in part; or

25.11.1.2. within 20 business days after receiving the claim the respondent does not pay the claimed amount in full;

25.11.2. The claimant can make an application to an ANA for adjudication of the claim.

25.11.3. A payment claim must be endorsed under the Act and, where the payment claim is directed against a home owner, contain a statement in a proscribed form advising home owners of their liability under the Act, the consequences of ignoring the payment claim and where further information in various languages can be obtained in relation to responding to the payment claim.

25.11.4. The application must set out all the grounds upon which the claimant claims to be entitled to the payment and be accompanied by any prescribed fee.

25.11.5. The respondent would have 20 business days after receipt from the ANA of the adjudicator's notice of acceptance and copy of the application to prepare an adjudication response (the response) to the application. The response may be a defence or a cross-claim or both. The adjudicator must not consider any response that is out of time.

25.11.6. Within 5 business days after receiving a copy of the response, the claimant may lodge with the ANA a reply (the rejoinder) to the response. The rejoinder may not include new claims. The adjudicator must not consider any rejoinder that is out of time.

25.11.7. The adjudicator may request further submissions from either party and must give the other party an opportunity to comment on any further submissions. The adjudicator may convene a conference of both parties and may conduct an inspection.

25.12. Apart from the changes described in para 25.11 above, the provisions of the federal legislation would apply mutatis mutandis to residential adjudication.

26. QUESTION 26: Should the security of payment laws be enhanced so as to provide small business with other dispute resolution mechanisms?

26.1. No.

26.2. Adjudicate Today supports the recommendation of Professor Philip Evans as identified by the Review in the Issues Paper.

26.3. Time is of the essence in resolving industry payment disputes. Introducing additional disputes resolution mechanisms, such as mediation or conciliation, will substantially push out time frames and be of little assistance in quick dispute resolution where parties hold entrenched positions. Unfortunately building industry disputes are generally characterised by parties holding entrenched positions.

27. QUESTION 27: Does security of payments laws provide an effective or suitable mechanism for dealing with small claims?

27.1. Yes.

27.2. Refer question 28 below.

28. QUESTION 28: Do the costs associated with adjudications deter applications from small parties?

28.1. No, other than Qld.

28.2. Adjudicate Today pioneered subsidising small claim applications. Other ANAs have copied our approach.

28.3. Our current fee structure has been recently widened to the following (all amounts include GST:

28.3.1. Up to $15,000 - fixed price of $1,089

28.3.2. From 1,501 to $25,000 - fixed price of $2,178

28.3.3. From $25,001 to $40,000 - fixed price of $3,300.

28.4. Other than Qld where ANAs are abolished, this program is popular and does not act as a barrier to the making of claims as low as $200. Most adjudicators, but not all as described in para 12.10 above, will award recovery of 100% of the adjudication fees where the claimant has been successful in the adjudication application.

28.5. In Qld, the cost of making a small claim adjudication application is prohibitive to some. In that state, the average cost of making an application has almost doubled from 23.4% of the claim value to 41.5%. This issue is fully explored at para 4.14 onwards.

28.6. The other cost barrier can be the cost of obtaining professional advice on the process of making or responding to an application under security of payment legislation. The abolition of ANAs in Qld, and the introduction of an application fee, have greatly increased the total cost of making an adjudication application in that State. Parties who previously could take free, professional advice from ANA staff as to the procedures of the BCIP Act have had this opportunity taken from them. We refer the Review to para 4.14 onwards.

29. QUESTION 29: How should acts of intimidation and retribution in relation to the use of security of payments legislation be handled?

29.1. Any form of intimidation or retribution (victimisation) in relation to security of payment legislation is contemptable and should be made a criminal offence.

29.2. We support recommendation 24 of the Senate Economics References Committee (2015) Insolvency in the Australian Construction Industry:

> *"…it be made a statutory offence to intimidate, coerce or threaten a participant in the building industry in relation to the participant's access to remedies available to it under security of payments legislation."*

29.3. The ABCC would seem the natural choice to oversight this provision and take prosecutions, if necessary.

29.4. Where a company has been successfully prosecuted, the ABCC should have the power to sanction and / or exclude from federal government contracts head contractors who have repeatedly failed to make payments or return retention money within the specified time to sub-contractors, as is the case under the WA Building and Construction Industry Code of Conduct 2016.

30. EXTRA MATTERS

30.1. Payment Withholding Requests

30.1.1. At para 3.23 we commented on the success of the NSW amendment in 2010 inserting a new Division 2A into the Act. That amendment allows a claimant (a subcontractor), who has made an adjudication application, to serve a 'payment withholding request' upon the principal. The principal is then required to retain sufficient money due to the respondent (a head contractor) to cover the claimant's payment claim.

30.1.2. This mechanism, while allowing a subcontractor to issue a payment withholding request much earlier than under the Contractors' Debts Act, does not guarantee payment to the subcontractor in circumstances where the principal has already paid the respondent its payment entitlement.

30.1.3. A payment withholding request can only be made upon lodgement of the adjudication application. It is some time after the claimant makes the payment claim before the claimant can make an adjudication application. In the meantime, the principal will probably have paid the respondent the claimant's money. If the claimant could serve the payment withholding notice at the same time the claimant makes the payment claim on the respondent, then protection of the claimant's position would be greatly enhanced.

30.1.4. If a payment withholding request is made at the earlier time of serving the payment claim than consequential changes are necessary.

30.1.4.1. When the payment schedule is not received within the prescribed time and after the time for proper notice has expired, the principal must pay the claimant's payment claim (or so much as is possible) out of the money the principal is liable to pay the respondent for the claimant's work.

30.1.4.2. When the payment schedule is received within time but is not paid by the due date, the principal will pay the claimant the scheduled amount out of the money the principal is liable to pay the respondent.

30.1.5. While the respondent remains solvent such a provision would be as effective for claimants who utilise it as would be the deemed trust. However, the deemed trust would be effective in the event of all insolvencies and would benefit all subcontractors, suppliers and workers, not only those who use security of payment legislation.

30.1.6. There is no reason why both our deemed trust proposal and extended payment withholding request proposal could not work together.

30.2. Requirement to serve a notice of intention to start proceedings if no payment schedule is received before being able to request judgement debt from the court

30.2.1. At first impression, this 2014 amendment to BCIP Act was appropriate. It was always unfair that claimants could commence court recovery action for a statutory debt without any advance warning to respondents, particularly as warning was required before commencing an adjudication application. In jurisdictions, other than Qld, this remains the position.

30.2.2. In fact, the devil of the amendment is in the detail. Subcontractors have had a plank applied to their head which they never saw coming. The manner in which the Act was amended created new and quite unnecessary obstacles for subcontractors seeking prompt payment for work performed. Under the guise of correcting an anomaly affecting respondents, subcontractors were punished.

30.2.3. Before the amendment, and where no payment schedule was served, the statutory debt was created after the elapse of 10 business days from date of receipt of the payment schedule. The amendment, and without any explanation at all, pushes the creation of the statutory debt to a period that can be months (years) later being when judgement in favour of the claimant is given by the court [refer section 19(6) of BCIP Act].

30.2.4. The removal or delay in the creation of the statutory debt, re-allocates risk from the respondent back to the claimant. In the event of an insolvency between the elapse of the 10 business days (pre-2014 amendments) and the date of a court judgement (now), the debt has not been created and any lien rights, which otherwise existed, are lost.

30.2.5. Adjudicate Today supports the giving of a notice before starting any proceedings (either adjudication or litigation) where no payment schedule has been received, However, this is not a reason to push the creation of the statutory debt from the elapse of 10 business days from date of receipt of the payment schedule.

30.3. Suppliers of Goods

30.3.1. In 2013, the NSW Supreme Court handed down its decision in *Class Electrical Services v Go Electrical [2013] NSWSC 363 [Class Electrical].* The result of this decision effectively excluded almost all suppliers from using the Act to recover payment for the supply of goods related to construction work. This is because the court decided that a supply of goods under a supply account or credit application was not a contract under the Act, and instead each separate purchase order or invoice was its own construction contract.

30.3.2. This means that the supplier would have to make a claim and make an adjudication application for each and every invoice, as opposed to making a single claim for all money owed on the account.

30.3.3. The decision renders security of payment legislation cost and time prohibitive and not an option for suppliers who have a pile of 50 invoices for under $1,000. While the invoices may total $40,000, they would have to make 50 adjudication applications to recover the payments.

30.3.4. The judgment effectively excludes the massive supply sector from the use of the Act.

30.3.5. We recommend the Act be amended to step around this decision so that contracts that consist of both an credit account application with terms and conditions, and the orders and invoices generated under that application, comprise a single construction contract within the meaning of the Act.

30.4. Payment of adjudicators - Alucity

30.4.1. On 25 September 2015, the NSW Court of Appeal *in Alucity Architectural Product Supply v Paul J Hick*[49] decided that adjudicators have jurisdiction to determine whether a payment claim or an adjudication application is valid and can lawfully charge adjudication fees even when they find that there was no valid payment claim or valid adjudication application.

30.4.2. After that date on 21 December 2016, the High Court delivered its first decision on the interpretation of the NSW Act being *Southern Han Breakfast Point v Lewence Construction*[50]

30.4.3. In Lewence Construction, Adjudicator Ian Hillman had accepted an adjudication application and make an adjudication determination. In the Supreme Court Southern Han sought a declaration that Mr Hillman's purported determination was void on the ground that the purported payment claim was not a payment claim under the Act because it was not made on or from an available reference date.

30.4.4. Mr Justice Bell made the declaration sought. He found that there was no reference date to support the purported payment claim. Lewence appealed to the New South Wales Court of Appeal. The Court of Appeal set aside the declaration. The Court of Appeal was unanimous in holding that the existence of a reference date was not a precondition to the making of a valid payment claim.

30.4.5. In *Southern Han Breakfast Point v Lewence Construction*, the High Court set aside the decision of the New South Wales Court of Appeal and clarified the interpretation of the Act. In a unanimous decision five judges of the High Court held at [61]:

> *"Section 8(1) makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract. In that way the existence of a reference date under a construction contract within the meaning of section 8(1) is a precondition to the making of a valid payment claim under section 13(1)."*

30.4.6. In some circles, doubt is being raised as to whether Alucity is consistent with the High Court's *Southern Han* decision and would survive another challenge[51].

30.4.7. The issue agitated is whether the absence of a reference date allows any part of the Act to be triggered.

30.4.8. To remove uncertainty, Adjudicate Today recommends that the Review clarify the right of an adjudicator to recover fees regardless of the validity or otherwise of a payment claim and/or adjudication application.

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[49] [2016] 168 (ALCN 32
[50] [2016] HCA 52
[51] Australian Construction Law Newsletter #172 January/February 2017 "Revisiting Adjudication Fees when No Jurisdiction" Philip Davenport at page 40.