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Recommended Citation
Harmonisation of Construction Industry Payment Legislation in Australia – A Survey of Construction Lawyers

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ABSTRACT
With parliaments in ACT, Tasmania and South Australia all passing construction industry payment legislation (‘the legislation’) towards the end of 2009, the legislation has now been enacted, in one form or another, in all eight Australian States and Territories. As its stands there is, to varying degrees, disparity between each of the relevant Australian Acts. This disparity is particularly marked between the Western Australian and Northern Territory Acts, on the one hand, and the New South Wales, Victorian, Queensland, Australian Capital Territory, Tasmanian and South Australian Acts on the other. This paper presents the findings of a questionnaire survey aimed to solicit the views of construction lawyers in Australia as to the desirability of legislative harmonisation, the appropriateness of the existing legislative models for various types of payment claim, and the suitability of various proposals for a nationally unified legislative model.

KEYWORDS
security of payment, statutory adjudication, harmonisation

INTRODUCTION
It is now 12 years since the Building and Construction Industry Security of Payment Act 1999 commenced in New South Wales. During that time, construction industry payment legislation (‘the legislation’) has progressively been enacted throughout all the other Australian jurisdictions,¹ culminating in the Tasmanian Act which received Royal Assent

on 17 December 2009. ² Although the other Australian jurisdictions modelled their legislation, to varying degrees, upon the NSW Act, there is considerable inconsistency between the various Australian Acts. This inconsistency is most marked, with respect to the underlying conceptual frameworks and detail of the drafting, between the Western Australia (WA) and Northern Territory (NT) Acts on the one hand which more closely resemble the United Kingdom (UK)³ and New Zealand (NZ)⁴ Acts, and the other Australian Acts on the other which are more closely modelled on the NSW Act. Accordingly, the WA and NT Acts have been collectively labelled⁵ as the ‘West Coast’ model legislation as opposed to the ‘East Coast’ model tag given to the other Australian Acts.⁶ This paper generally refers to the NSW legislation as representative of the East Coast model, and the WA legislation as representative of the West Coast model.

A common objective of all the Australian legislation is the eradication of unfair contractual provisions and practices with regards to payment in order to get cash flowing down the hierarchical contractual chains that exist on most construction projects. All the legislation also provides for rapid and mandatory statutory adjudication of contractual payment disputes in the construction industry designed to facilitate quick and inexpensive resolution of such disputes.

There appears to be a general consensus that the inconsistency in the legislation across Australia is an undesirable state of affairs. As such, in recent times there has been a call from several commentators – echoing the recommendation of the Cole Royal Commission (Cole 2003) nearly a decade ago – that the legislation should be harmonised into a uniform national approach in order to benefit the construction industry (Bailey 2009; Zhang 2009; Bell & Vella 2010). Some of these commentators have put forward proposals and ideas as to the most appropriate conceptual framework for a unified approach (Davenport 2007; Bailey 2009; Brand & Davenport 2010; Coggins 2011).

After initially considering the legislative objective, and key differences between the East and West Coast legislative models, this paper briefly considers three different proposals that have been proffered as the basis for unified national legislation. The results of a pilot

² Although the Tasmanian Act commenced operation before the Australian Capital Territory (ACT) and South Australia (SA) Acts, it was actually the last Act to be passed by Parliament in Australia.


⁴ *Construction Contracts Act 2002* (NZ) – the ‘NZ Act’.


⁶ Which more closely resemble the NSW Act.
survey of Australian construction lawyers with respect to harmonisation of the legislation, carried out by the authors, are then presented. From the pilot survey, preliminary observations are made as to the respondents’ views as to suitability of the existing legislation for resolving payment disputes, and the desirability and form of harmonising legislation.

THE OBJECTIVE OF THE LEGISLATION

Although the overall common objective of the East and West Coast legislative models is the same - to facilitate the flow of cash in a swift manner down the hierarchical contractual chain on construction projects\(^7\) - some differences with respect to legislative parliamentary intent can be detected from the Second Reading Speeches.

Despite the East Coast model’s wide ranging scope, affording protection to all parties who carry out work (or supply goods and services) in the construction industry, the focus of the Second Reading Speech for the NSW Bill given by the Minister, Mr Morris Iemma, was very much on protecting the vulnerable small subcontractor. As Mr Iemma (1999: 1594) states:

\[
\text{It is all too frequently the case that small subcontractors - such as bricklayers, carpenters, electricians and plumbers - are not paid for their work. Many of them cannot survive financially when that occurs, with severe consequences for themselves and their families.}
\]

Mr Iemma (1999: 1595) continued:

\[
\text{Hundreds of subcontractors in New South Wales struggle to survive when they do not receive money owed to them for work undertaken. They do not have the cash flow allowing them to keep on working while waiting for payment. This causes hardship not only to them but also to their families.}
\]

The intent and design of the East Coast model legislation, therefore, would appear to be geared towards the protection of smaller contractors (or suppliers) by ensuring they are entitled to, and are able to recover, progress payment claims for construction work they have undertaken (or related goods and services they have supplied).\(^8\)

The intent of the West Coast model is similarly wide ranging in its scope of coverage, but unlike the East Coast model, would appear to be intended to commensurately cater for a wide range of contractual payment claims, ranging from small to complex. Accordingly,

\(^7\)See the Second Reading Speeches for each of the Acts: ACT (Hargreaves J, 15 October 2009); NSW (Iemma M, 29 June 1999); NT (Toyne P, 14 October 2004); Queensland (R E Schwarten, 18 March 2004); SA (Kenyon T, 5 March 2009); Tasmania (Singh L M, 4 November 2009); Victoria (Thomson M R, 21 March 2002); WA (MacTiernan A J, 3 March 2004).

\(^8\)See, for example, s 3(1) of the NSW Act.
in her Second Reading Speech for the WA Construction Contracts Bill, the Minister, Ms MacTiernan (2004: 274), states that the legislation’s:

*primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims.*

THE KEY DIFFERENCES BETWEEN THE EAST AND WEST COAST MODELS

Several differences exist between the two models with respect to concept and detail. For the purposes of this paper, three of the key differences are discussed below.

**Dual payment system versus freedom of contract**

The East Coast model operates a ‘dual payment’ system for progress payment claims, creating a statutory payment system which runs alongside any contractual regime.⁹ In order to engage the statutory payment system, a claimant must endorse its payment claim as being made under the Act,¹⁰ and serve it upon the respondent.¹¹ The West Coast model does not operate a dual payment system, but rather payment claims referred to in the Act are those made under the contractual regime.

The East Coast model provides for recovery of progress payments for construction work undertaken or goods and services supplied only and, therefore, by definition only allows contractors or suppliers to recover payment from their principals, i.e., ‘upstream’ claims. The scope of the West Coast model is wider, providing the right for either party to make an adjudication application in relation to any payment disputes¹² falling within the scope of the building contract, including debts and damages claims within the scope of the contract.

Under the East Coast model’s statutory payment regime, a respondent has up to 10 business days¹³ after the payment claim is served to serve a payment schedule indicating the amount of the payment it proposes to make. If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less with reasons for withholding payment.¹⁴ If the respondent either schedules an amount less

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⁹ *Beckhaus v Brewarrina Council* [2002] NSWSC 960 per Macready AJ at [60]. Such a dual payment system was described as a “dual railroad track system” by Macready AJ in *Transgrid v Siemens &Anor* [2004] NSWSC 87 at [56].

¹⁰ See s 13(2)(c) of the NSW Act.

¹¹ See s 13(1) of the NSW Act.

¹² See s 25 of the WA Act.

¹³ Except in the SA Act which allows 15 business days – see s 14(4)(b)(ii) of the SA Act.

¹⁴ See s 14(3) of the NSW Act.
than the payment claim or fails to pay the whole or part of the scheduled amount by the
due date, the claimant may make an adjudication application under the Act.\textsuperscript{15}
In the case where a lesser amount is scheduled and paid, the claimant must serve an
adjudication application on an Authorised Nominating Authority (ANA) of their choice,\textsuperscript{16}
with a copy served on the respondent,\textsuperscript{17} within 10 business days\textsuperscript{18} after receiving the
payment schedule.\textsuperscript{19} The respondent then has either a period of 5 business days\textsuperscript{20} after
receiving a copy of the application or 2 business days\textsuperscript{21} after receiving notice of an
adjudicator’s acceptance of the application, whichever is the later, to lodge an
adjudication response with the adjudicator.\textsuperscript{22}
If the respondent does not duly provide a payment schedule, it becomes liable to pay the
claimed amount to the claimant on the due date for the progress payment.\textsuperscript{23} Where no
payment schedule is provided, the claimant has two paths available under the Act by
which to recover the payment claim.
The first path is for the claimant to seek summary judgment in court for the debt due,\textsuperscript{24} in
which case the respondent is not entitled to bring any cross-claim against the defendant in
the summary judgment proceedings, or raise any defence in relation to matters arising
under the construction contract.\textsuperscript{25} The second path is for the respondent to apply for the
payment claim to be determined in adjudication,\textsuperscript{26} in which case the respondent will be
disallowed from lodging an adjudication response.\textsuperscript{27} This means that a respondent will
not then have an opportunity to be heard by the adjudicator, who is essentially limited to a

\begin{enumerate}
\item See s 17(1) of the NSW Act.
\item See s 17(3)(b) of the NSW Act.
\item See s 17(5) of the NSW Act.
\item See s 17(3)(c) of the NSW Act.
\item Except in the SA Act which allows 15 business days – see s 17(3)(c) of the SA Act.
\item Except in the Tasmanian Act (7 business days) and ACT Act (10 business days).
\item Except in the Tasmanian Act (5 business days) and ACT Act (5 business days).
\item See s 20(1) of the NSW Act.
\item See s 14(4)(b) of the NSW Act.
\item See s 15(2)(a)(i) of the NSW Act.
\item See s 15(4)(b) of the NSW Act.
\item This second path may be preferable to some claimants in terms of speed of recovery as the
claimant may request an adjudication certificate from the relevant ANA stating the adjudicated
amount (see s 24 of the NSW Act) and file the adjudication certificate as a judgment for a debt in
any court of competent jurisdiction (see s 25 of the NSW Act).
\item See s 20(2A) of the NSW Act.
\end{enumerate}
consideration of the submissions duly made by the parties\textsuperscript{28} when determining the adjudication.\textsuperscript{29}

Even in circumstances where the respondent has duly served a payment schedule, it may only include in its adjudication response reasons for withholding payment which have previously been included in the payment schedule.\textsuperscript{30} Thus, a respondent may be prevented from being able to present its full case to the adjudicator unless it has previously served a comprehensive payment schedule which covers all the issues it may wish to rely on subsequently.

Unlike the East Coast model, the West Coast model provides no detailed statutory payment system but rather gives primacy to the parties’ agreed contractual payment regime.\textsuperscript{31} Thus, where no progress payment is certified in response to a payment claim under the contract within the time stipulated in the contract, the claimant has no statutory right to summary judgment (as per the East Coast model) but must apply to the courts for summary judgment.\textsuperscript{32} Unlike the East Coast model, the West Coast legislation does not make the serving of a response to the payment claim\textsuperscript{33} a condition precedent to the right of a party who is served with an adjudication application\textsuperscript{34} to lodge an adjudication response. Additionally, there are no limitations as to the inclusion of reasons for withholding payment in a response to an adjudication application. Thus, providing that a party lodges their response to an adjudication application within the time allowed by the legislation,\textsuperscript{35} it will not be deprived of the opportunity to present its full case.

\textit{Types of payment claims allowed}

The East Coast legislation was only intended to cover ‘purely progress payment claims’ (Davenport 2007: 15). Consequently, the East Coast adjudication scheme was designed

\textsuperscript{28}I.e., payment claim, payment schedule and all submissions that have been duly made in their support.

\textsuperscript{29}See s 22(2) of the NSW Act.

\textsuperscript{30}See s 20(2B) of the NSW Act.

\textsuperscript{31}If no such payment regime is provided for in the construction contract, then the payment provisions set out in Schedule 1 of the legislation are implied into the contract.

\textsuperscript{32}If the courts permit summary judgment this does not guarantee swift and inexpensive recovery of a certified payment. There is still the possibility that a defendant may be able to defeat an application for summary judgment by demonstrating to the court that it can mount a reasonable defence by way of a cross claim based upon the facts and law, in which case the only option left to the contractor will be to pursue its claim in a relatively lengthy and costly court trial or arbitration hearing.

\textsuperscript{33}I.e., the equivalent of a “payment schedule” in East Coast terminology. Although under the West Coast legislation a response to a payment claim is a contractual requirement rather than a statutory requirement.

\textsuperscript{34}I.e., the equivalent of the “respondent” in East Coast terminology.

\textsuperscript{35}Within 14 days (WA Act, s 27(1)) or 10 working days (NT Act, s 29(1)) after the date on which a party to a construction contract is served with an application for adjudication.
solely for the valuation of construction work undertaken or related goods and services supplied. As submitted by Brand and Davenport (2010: 5), the East Coast adjudication scheme was not intended (and, therefore, designed) to accommodate more complex claims for monies due under the contract such as, for example, delay damages claims by a contractor or liquidated damages claims which the principal, or their contract administrator, may set off against a progress claim. Accordingly Davenport (2007: 23) states “adjudication of a progress claim is a fast track process that is not suitable for deciding issues of breach of contract, extensions of time, repudiation and termination, causation, quantification of damages etc.”.

The difference in progress payment amount between the statutory entitlement, as determined by the adjudicator under the East Coast legislation, and the contractual entitlement, as determined by the contract administrator, appears to have resulted in some confusion and inconsistency with respect to what amounts should or should not be included in an adjudicator’s determination. Accordingly, with respect to set offs under the current East Coast adjudication process, Davenport (2007: 22) states:

*There are differences in the approach taken by adjudicators. Some take the approach that only a debt (owed to the purchaser) that is admitted by the supplier or has been decided by a court or tribunal or in arbitration or has been created under a dispute resolution clause in the contract, can be set off against progress payments... Other adjudicators decide disputed issues of liability for and quantum of the back charges... Some adjudicators allow a set off of an amount claimed by the purchaser even if liability and quantum have not been proven.*

Furthermore, the NSW judiciary has allowed claimants to recover amounts for delay damages in adjudicated payment claims under the Act. 36 This, as Davenport (2007: 14) puts it, creates an “imbalance”37 as only one party is allowed to apply for adjudication of payment disputes regarding damages. As claims for damages falling within the scope of the contract have the potential to be made by either contractual party, 38 it is procedurally unfair to allow only one party the right to refer such claims to the Act’s dispute resolution processes.

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36 See *Coordinated Construction Co Pty Ltd v JM Hargreaves Pty Ltd* [2005] NSWCA 228; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd &Ors* [2005] NSWCA 229; *Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd &Ors*[2005] NSWCA 142; and, *John Holland Pty Limited v Roads & Traffic Authority of New South Wales &Ors*[2007] NSWCA 19.

37 Also see Brand and Davenport (2010: 5).

38 E.g. contractors’ claims for delay and disruption costs caused by principals, and principals’ claims for liquidated or general damages for contractor’s delay in achieving practical completion.
Permitted approach of adjudicator in making the determination

Under the East Coast model, the adjudicator is limited to a consideration of documents submitted by the parties when making his or her determination. An adjudicator under the West Coast legislation is not restricted to a consideration of documents submitted by the parties when making his or her determination as in the East Coast model. Rather, the legislation encourages a West Coast adjudicator to be more evaluative in their approach to determination by providing that an adjudicator “is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit”. This has the effect of extending the adjudicator’s investigative powers beyond the consideration of the parties’ submissions, thus assisting the adjudicator in ascertaining the facts and the law.

OVERVIEW OF EXISTING PROPOSALS FOR HARMONISATION

Three proposals for a unifying model of legislation are summarised below.

Davenport’s proposal for a dual process of adjudication

Davenport (2007) has proposed a dual process of adjudication which aims to combine the East Coast and West Coast model statutory adjudication processes in order to ‘solve many of the perceived problems with adjudication in the building and construction industry’ (Davenport 2007: 12). Davenport (2007: 15) states that:

The proposed dual process would retain the [East Coast] certification process for purely progress payment claims, i.e. for claims for the value of work, goods or services that have actually been provided, and would adopt the traditional [West Coast] process for other payment disputes.

Davenport explains that his proposed dual process of adjudication ‘would be basically the same as now exists but with slightly different rules for dealing with progress claims and ex-contractual claims’ (Davenport 2007: 15).

This would, thus, allow an adjudication process which is faster-track, cheaper and significantly more restrictive on the investigative powers of the adjudicator for purely

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39 Which, in practice, means that an adjudicator under the East Coast legislation often makes a determination on documents only.

40 See s32(1)(b) of the WA Act, and s34(1)(b) of the NT Act. Note that the NT Act substitutes the word “appropriate” for “fit” in this provision.

41 For further details of Davenport’s proposed dual process, also see Brand and Davenport (2010).

42 Davenport cites examples of such ‘other payment disputes’, which he terms ‘ex-contractual claim’, including, inter alia: a contractor’s claim for delay damages for breach of contract by the principal, a contractor’s claim for the value of extra work carried out for which the superintendent refuses to direct a variation in writing, a principal’s claim for liquidated or general damages for delay in achieving practical completion, and a principal’s claim for the costs of having work carried out under the contract, which the contractor disagrees is included in the contract, by another contractor.
progress payment claims, and a quasi-judicial adjudication process for adjudication of ex-contractual claims.\textsuperscript{43} Notably, however, Davenport has proposed some significant procedural modifications with respect to the operation of the ‘traditional’, West Coast, process for adjudication of ex-contractual claims. For example, a statutory system, similar to the current statutory payment system under the East Coast model, is prescribed for the serving of ex-contractual claims by claimants and defences by respondents prior to the lodging of a ‘traditional’ process adjudication application.

Davenport’s proposal is based on a view that the East Coast model in its present form provides an efficient and procedurally fair scheme for resolving purely progress payment disputes, but not for claims for other debts and damages. By providing a West Coast system for such debts and damages claims, Davenport argues that procedural fairness will be restored.

\textit{Bailey’s Proposal for a Cap on Claim Amounts}

Bailey (2009) advocates a cap on claim amounts under rapid mandatory adjudication schemes for payment, thereby confining the benefits of the ‘short, sharp interim adjudication procedure’ to participants in small business. Accordingly, Bailey (2009: 3) states:

\begin{quote}
If the intended small business focus of the reform had been more narrowly defined in the legislation and the process refined for that sector of the construction industry, then the complexities that pervade the process might not have developed as they have.
\end{quote}

The outline conceptual framework of Bailey’s proposed scheme essentially involves capping ‘the value of claims and the amount of main contracts and sub-contracts\textsuperscript{44} which are to be subject to the process … with limited or scaled or stepped processes defined’ (Bailey 2009:3). Further, Bailey (2009: 3) proposes that:

\begin{quote}
the scheme should be limited only to claims for payment for the value of work performed. This necessarily will include work outside the contractual scope (i.e., variations).\textsuperscript{45} Time-related claims, other than those for which there is established entitlement under contractual regimes, ought be excluded.
\end{quote}

\textsuperscript{43} Where, as Davenport points out, an adjudicator ‘is more likely to call for further submissions or hold a conference or make an inspection.’

\textsuperscript{44} This issue was the subject of complex amendment in s.10A of the amendments to the Victorian Act in 2007.

\textsuperscript{45} The Victorian amendments to the legislation in 2007 sought to address this issue.
Thus, larger and more complex disputes arising in the construction industry would not be subject to statutory rapid adjudication, instead being ‘dealt with under procedures that are developed specifically for them including commercial arbitration’ (Bailey 200: 3).

*Coggins’ proposal for a dual process of adjudication according to size of progress payment claim*

Using Davenport’s concept of a dual process and Bailey’s concept of claim capping, Coggins (2011) has proposed a hybrid adjudication scheme for consideration as a harmonised, unifying model.

The proposed scheme would be a dual process according to size or value of payment claim or, alternatively, of contract sum. It would employ the East Coast model process for small progress payment claims which fall below a prescribed cap value. Payment claims which could be adjudicated under the East Coast process would be strictly limited to payment claims for construction work carried out or supply of related goods and services. Payment claims which involve disputes over what Davenport terms as ‘ex-contractual’ claims would not be permitted to be adjudicated under the capped East Coast process, but would be resolved under the West Coast process instead.

Progress payment claims which are greater in amount than the capping value, which it is suggested should initially be $25,000, for the East Coast process would be adjudicated under the West Coast process. Additionally, any payment claims, regardless of size, which involved ‘ex-contractual’ claims (e.g. a delay damages claim within the scope of the contract, or a liquidated damages claim set off against the certified payment amount by the principal or its agent) would be adjudicated under the West Coast process.

Coggins’ proposal is based on a view that:

- the restrictive nature of the East Coast adjudication scheme does not afford the required level of procedural justice to be expected from an effective alternative dispute resolution process, and that this level of restriction may only be justified to protect smaller, more vulnerable contractors as per the original parliamentary intent; and, as such,

- a ‘one-size fits all’ approach for the construction industry is inappropriate as several distinct differences exist between the higher and lower ends of the hierarchical contractual chain on construction projects with respect to, *inter alia*: use of balanced standard forms of contract, inclusion of impartial independent certifying mechanisms for progress payment in contracts, imbalance of bargaining power between contractual parties, and commercial vulnerability to cash flow problems of a relatively small amount.
RESEARCH METHODOLOGY

The target population for the pilot survey was Australian construction lawyers. It was felt that, although construction lawyers may not have the most experience as actual adjudicators under the legislation, their legal training, expertise and role as professional legal advisers to construction industry clients meant that they were the most likely to understand the differing legislative frameworks and content of the various Australian Acts, as well as judicial interpretation of the legislation.

The survey sample comprised 66 construction lawyers throughout Australia. The lawyers in the sample were selected by an internet search, browsing the staff profile data on websites of legal firms in Australia with specialist construction law departments. Lawyers who were shown to have expertise in construction law were included in the sample. Additionally, three lawyers who were known to the authors to have specific expertise on the legislation were included in the sample. Of the 66 questionnaires sent out, 10 responses were returned – a response rate of 15%.

It is intended that the responses from the pilot survey form the basis from which to inform a larger subsequent survey to be carried out in mid to late 2011.

The relatively small number of respondents, and sample of lawyers predominantly selected from a limited number of legal firms found via an arbitrary internet search, mean that the findings of this pilot survey per se are preliminary in nature; at best, the findings are, therefore, indicative and should be treated with caution. Nevertheless, the views of the respondents are certainly of interest.

The survey was distributed in an online format using the ‘TellUs2’ software application. The questionnaire comprised 30 questions, most of which required respondents to express their views, with respect to ideas or statements, on a Likert scale of 1 to 5. The survey results are presented below.

RESEARCH FINDINGS

In order to gauge the respondents’ type and level of experience in relation to the two Australian legislative models, they were asked to check various boxes to indicate their knowledge and experience with respect to the legislation (see Figure 1).

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46 Such lawyers were known to the authors principally due to their publications with respect to the legislation.

47 The survey was jointly administered by the author and David Delchau (final year undergraduate student, Bachelor of Construction Management & Economics, University of South Australia). David Delchau has presented his own separate analysis of some of the survey results in his 2010 undergraduate thesis.

48 Note that respondents were permitted to check more than one box when answering this question.
8 out of the 10 respondents had at least a good working knowledge of the East Coast legislation, and 7 of the respondents have advised clients with respect to the East Coast legislation. Only 4 out of the 10 respondents had at least a good working knowledge of the West Coast legislation, and 2 of the respondents have advised clients with respect to the West Coast legislation. For each model, only 2 respondents had any actual experience as an adjudicator.

The respondents were asked to rank on a scale of 1 to 5 (1 = highly undesirable, 5 = highly desirable) how desirable they thought it is for Construction Industry Payment legislation in Australia to be harmonised into a national unified model. The results are shown in Figure 2.
4 of the respondents felt that harmonised legislation was either desirable or highly desirable. 4 of the respondents felt neutral towards the proposition. 2 of the respondents felt harmonisation was undesirable.

The respondents were asked to rank on a scale of 1 to 5 (1 = not urgent, 5 = very urgent) how urgent they thought it is for Construction Industry Payment Legislation in Australia to be harmonised into a national unified model. The results are shown in Figure 3.

4 of the respondents felt that harmonisation was not urgent. 3 of the respondents felt harmonisation was urgent.

The respondents were asked to indicate the reasons why they thought harmonisation is desirable by checking up to three reasons give to them in the questionnaire. 8 of the respondents felt harmonisation is desirable because it would minimise duplication in, and reduce cost of education campaigns about the legislation. 7 of the respondents felt harmonisation is desirable because it would reduce costs of businesses moving between jurisdictions and operating in different jurisdictions. 2 of the respondents felt harmonisation is desirable because from the principle of equity, it is not right that
subcontractors in some jurisdictions should have more favourable payment rights than in others.

When asked whether there any other reasons why they thought harmonisation is desirable apart from those listed in the questionnaire, the following responses were received:

- Would allow the creation of a central national adjudication body with one set of rules and a more consistent body of law in the area... It also allows the adjudicators to be focused on one piece of legislation providing greater certainty and confidence in the process.
- State Government Laws proved unequal to the task of understanding the issues involved.
- Greater certainty in legal precedent.
- It would assist contractors, subcontractors, consultants (such as architects, project managers and lawyers to operate with more certainty.

I can see no compelling benefits to harmonisation.

I think there needs to be a couple of points of clarification: 1 The issue of a need for harmonisation is largely illusory in the circumstances that most small and medium contractors only operate in one jurisdiction. In any event, those operating in multiple jurisdictions are quite used to dealing with different OH & S laws, building certification and permit requirements etc, therefore the Security of Payment (SOP) issue is just a further matter to take into account and is probably not at the forefront of their thinking. From a respondent's point of view they should seek advice from lawyers in the relevant jurisdiction to mitigate this risk. 2 Harmonisation is only desirable if the actual legislative regime is fixed and made more effective and equitable to all industry participants, therefore principals and head contractors should also have a voice in this debate. Too often in the past they have been largely overlooked. Their treatment in NSW and to a lesser extent in Qld and Victoria has been shameful. There is no point in harmonisation if the bad east coast regime is the benchmark.

When asked about the best way to achieve enactment of uniform legislation, the respondents significantly preferred the option which stated that uniform legislation be developed by the Standing Committee of Attorneys-General, and subsequently enacted in each State and Territory. Their second preference was that Commonwealth legislation be enacted which overrides existing State and Territory legislation. Their third preference was for Commonwealth legislation to be enacted which, by regulation, could exempt States and Territories from the Commonwealth legislation if they enacted legislation which was at least as favourable as the baseline set by the Commonwealth legislation.
The respondents were asked to rank on a scale of 1 to 5 (1 = totally disagree, 5 = totally agree) the extent to which they agreed with the following statement: ‘Construction industry payment legislation should afford greater protection to smaller contractors (and suppliers) than medium or large contractors (and suppliers)’. The results are shown in Figure 4.

![Figure 4 – ‘The legislation should protect small contractors more’](image)

4 of the respondents strongly disagreed that small contractors should receive a greater level of protection from the legislation than medium or large contractors. 4 respondents felt neutral to the proposition. 2 respondents strongly agreed with the proposition.

The respondents were asked to rank on a scale of 1 to 5 (1 = totally disagree, 5 = totally agree) the extent to which they agreed with the following statement: ‘Construction industry payment legislation should afford greater protection to smaller and medium contractors (and suppliers) than large contractors (and suppliers)’. The results are shown in Figure 5.

![Figure 5 – ‘The legislation should protect small and medium contractors more than large contractors’](image)
3 of the respondents strongly disagreed that small and medium contractors should receive a greater level of protection from the legislation than large contractors. 5 respondents felt neutral to the proposition. 1 respondent agreed, and 1 respondent strongly agreed, with the proposition.

The respondents were asked to rank on a scale of 1 to 5 (1 = totally disagree, 5 = totally agree) the extent to which they agreed with the following statement: ‘Construction industry payment legislation should afford the same level of protection to all contractors (and suppliers) regardless of size’. The results are shown in Figure 6.

![Figure 6 – ‘The legislation should protect contractors of all sizes equally’](image)

2 of the respondents strongly disagreed, and 1 disagreed, that the legislation should protect contractors of all sizes equally. 3 respondents felt neutral to the proposition. 1 respondent agreed, and 3 respondents strongly agreed, with the proposition.

The respondents were asked to indicate on a scale of 1 to 5 (1 = Not appropriate, 5 = Very appropriate) how appropriate they thought the East Coast legislative model is in fairly resolving purely progress payment claims under $25,000, between $25,000 and $99,999, and over $100,000. The results are shown in Figure 7.
For all size categories, at least 50% of the respondents viewed the East Coast model as, to some degree, inappropriate for resolving purely progress payment claims. For resolution of purely progress payment claims over $100,000, 70% of the respondents viewed the East Coast model as, to some degree, inappropriate. For resolution of purely progress payment claims under $25,000, 40% of the respondents viewed the East Coast model as, to some degree, appropriate.

The respondents were asked to indicate on a scale of 1 to 5 (1 = Not appropriate, 5 = Very appropriate) how appropriate they thought the East Coast legislative model is in fairly resolving other types of payment claims (i.e., claims for damages and debts) under $25,000, between $25,000 and $99,999, and over $100,000. The results are shown in Figure 8. As may be seen, for all size categories, at least 70% of the respondents viewed the East Coast model as, to some degree, inappropriate for resolving other types of payment claims.
The respondents were asked to indicate on a scale of 1 to 5 (1 = Not appropriate, 5 = Very appropriate) how appropriate they thought the West Coast legislative model is in fairly resolving purely progress payment claims under $25,000, between $25,000 and $99,999, and over $100,000. The results are shown in Figure 9.

For resolution of purely progress payment claims below $25,000, 80% of the respondents viewed the West Coast model as, to some degree, appropriate. For resolution of purely progress payment claims between $25,000 to $99,999, 60% of the respondents viewed the West Coast model as, to some degree, appropriate. For resolution of purely progress payment over $100,000, 50% of the respondents viewed the West Coast model as, to
some degree, appropriate. For resolution of purely progress payment claims in each size category, no more than 20% of the respondents viewed the West Coast model as, to some degree, inappropriate.

The respondents were asked to indicate on a scale of 1 to 5 (1 = Not appropriate, 5 = Very appropriate) how appropriate they thought the West Coast legislative model is in fairly resolving other types of payment claims (i.e., claims for damages/debts) under $25,000, between $25,000 and $99,999, and over $100,000. The results are shown in Figure 10.

![Figure 10 – Appropriateness of West Coast model for resolution of other payment claims](image)

For resolution of other types of payment claim below $100,000, at least 60% of respondents viewed the West Coast legislative model as, to some degree, appropriate. However, for resolution of other types of payment claim above $100,000, only 30% of respondents viewed the West Coast legislative model as, to some degree, appropriate. For resolution of other types of payment claims in each size category, no more than 20% of the respondents viewed the West Coast model as, to some degree, inappropriate.

The respondents were asked to indicate on a scale of 1 to 5 (1 = Not appropriate, 5 = Very appropriate), how appropriate they thought the intended East Coast statutory entitlement to purely progress payment claims (i.e., an entitlement to progress payment claims for construction work carried out or related goods and services supplied which does not take account of any contractually agreed adjustments to progress payment claims for debts and damages) is for purely progress payment claims under $25,000, between $25,000 and $99,999, and over $100,000. This question essentially reflects respondents’ views as to progress payment amounts under the East Coast model’s payment system differing from contractually agreed progress payment amounts. The results are shown in Figure 11.
For progress payment claims below $25,000, 50% of the respondents viewed the East Coast model’s statutory entitlement as, to some degree, inappropriate. For progress payment claims between $25,000 to $99,999, 60% of the respondents viewed the East Coast model’s statutory entitlement as, to some degree, inappropriate. For progress payment claims above $100,000, 70% of the respondents viewed the East Coast model’s statutory entitlement as, to some degree, inappropriate. For progress payment claims in each size category, no more than 30% of the respondents viewed the East Coast model’s statutory entitlement as, to some degree, appropriate.

The respondents were asked to indicate on a scale of 1 to 5 (1 = Not suitable or not promising, 5 = Very suitable or very promising), how suitable or promising they thought the following 5 options were as a conceptual framework for a harmonising unified adjudication model in Australia:

1. All payment disputes to be adjudicated under the current East Coast process.
2. All payment disputes to be adjudicated under the current West Coast process.
3. Purely progress payment disputes up to a capped amount to be adjudicated under the East Coast process. Payment disputes above the capped amount to be resolved under traditional dispute resolution methods (e.g., arbitration or litigation).
4. Purely progress payment disputes up to a capped amount to be adjudicated under the East Coast process. All purely progress payment disputes above the capped amount, and all other payment disputes (relating to monetary amounts for damages or debts within the scope of the contract) of any amount, to be resolved under West Coast adjudication process.
5. All purely progress payment disputes of any amount to be adjudicated under the East Coast process. All other payment disputes (relating to monetary amounts for damages or debts within the scope of the contract) of any amount to be resolved under West Coast adjudication process.

Option 3 is akin to the Bailey proposal described above. Option 4 is akin to the Coggins proposal described above. Option 5 is akin to the Davenport proposal described above.

The results are shown in Figure 12.

![Figure 12 – Suitability of proposed harmonisation models](image)

The option which received most support as a unifying model was that all payment disputes to be adjudicated under the current West Coast process. 60% of the respondents indicated that the West Coast process would, to some degree, be a suitable harmonising model. Only 20% of the respondents viewed that the current East Coast process would be a suitable harmonising model. The East/West Coast hybrid models (options 4 & 5 above) received little support, with 70% viewing that option 4 would be unsuitable and 90% viewing option 5 would be unsuitable. Option 3 was viewed as unsuitable by 30% of respondents, and suitable by 20% of respondents.

When asked to propose a suitable cap amount for payment claims under the East Coast model if a capped model were to be introduced, one respondent suggested $25,000, another $200,000, and two respondents suggested $250,000. Other comments received in response to this question included:

*In my view the cap amount should be a Total Contract Sum cap. This sum should be approximately $100,000. In that event large contracts are not covered by SOP but smaller contracts are.*
I don't agree a unified system is desirable however I agree all systems should be capped. The contract sum, not the claim should be the determinator of the cap. In my opinion for contracts over $500k the parties should be entitled to negotiate to exclude the Act.

I believe that a capped regime, relating purely to payment disputes and excluding all, non agreed variations, time related claims etc using the East Coast model is appropriate up to a cap of $250,000. However, the legislation also needs to provide that the contractor may only rely upon the Act for the current payment claim. Work not claimed in previous months should go through the standard dispute resolution provisions. Alternatively, once a claim has been rejected with a payment schedule the contractor must take the claim to adjudication at the time of rejection. If it does not do so it loses the right to resubmit the claim or to seek adjudication of that issue in the future. Finally costs of adjudications need to be addressed as adjudicators, once appointed have an open cheque book.

CONCLUSION

All Australian States and Territories have enacted Construction Industry Payment. To varying degrees, all the Australian Acts differ from each other. However, fundamentally the eight Australian Acts may be categorised into one of two distinct models which differ in conceptual framework – the East Coast model and the West Coast model. As such, the issue of harmonisation of the legislation in Australia has become topical.

This paper has presented the results of a pilot survey of Australian construction lawyers as to their views as to: harmonisation, the effectiveness of the two distinct existing Australian models, and various suggested proposals for unifying legislation. Being a pilot survey, a significant limitation of the research findings presented exists in terms of the sample size and response rate. Therefore its findings must be treated as preliminary and, at best, indicative. The key findings of the preliminary research are as follows:

- Perhaps, surprisingly, there was not a majority consensus amongst the respondents that harmonisation was either desirable or urgent;
- Generally, the respondents favoured legislation which protected contractors of all sizes equally, rather than legislation designed to protect smaller contractors more than larger contractors;

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49 Although the SA Act has yet to commence.
• Significantly more respondents viewed the existing East Coast legislative model as inappropriate, rather than appropriate, for resolving both purely progress payment disputes and other types of payment dispute;

• Significantly more respondents viewed the existing West Coast legislative model as appropriate, rather than inappropriate, for resolving both purely progress payment disputes and other types of payment dispute;

• More respondents viewed the East Coast legislative model’s statutory entitlement to purely progress payments, which differs from standard form contractual entitlement, as inappropriate rather than appropriate;

• The existing West Coast legislative model was most favoured by respondents as a unifying model; and,

• The hybrid harmonising proposals (i.e., those combining East Coast and West Coast adjudication schemes) did not receive much support.

If the move towards harmonisation is to materialise, there is a need for more extensive research to be carried out in Australia to gauge statistically valid views of stakeholders. The pilot survey has highlighted the need to target a wider population than just construction lawyers. Accordingly, a subsequent full survey is planned in mid to late 2011 which will target all classes of parties who have had the experience of being involved in the statutory adjudication process, potentially including claimants, respondents, adjudicators as well as construction lawyers.

REFERENCES


