Law Council
OF AUSTRALIA
Business Law Section

Mr John Murray AM
Via email: jmur7464@bigpond.net.au

31 May 2017

Dear Mr Murray,

Review of Security of Payment Laws

I have pleasure in enclosing a submission which has been prepared by the Construction and Infrastructure Law Committee of the Business Law Section of the Law Council of Australia in response to the review of the security of payment laws Issues Paper.

The submission has been endorsed by the Queensland Law Society and the Law Society of Western Australia.

If you have any questions regarding this submission, in the first instance please contact the Committee Chair, Ross Williams. Mr Williams may be contacted by phone on 07-3169 4796 or via email: rwilliams@hwle.com.au

Yours sincerely,

Teresa Dyson, Chair
Business Law Section

Enc.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

CONSTRUCTION AND INFRASTRUCTURE LAW COMMITTEE
BUSINESS LAW SECTION, THE LAW COUNCIL OF AUSTRALIA

SUBMISSION ON SECURITY OF PAYMENT LAWS

This is a submission prepared by the Construction and Infrastructure Law Committee of the Business Law Section of the Law Council of Australia (**Committee**), in response to the Review of Security of Payment Laws Issues Paper by Mr John Murray AM.

This submission has the endorsement of the Law Society of Western Australia and the Queensland Law Society.

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

1.1 While the stated objectives of the respective Acts are being met in part, we share the view of the Senate Economic References Committee in its 2015 report on insolvency in Australia that security of payment laws across jurisdictions are not working as effectively as intended.[1]

1.2 The Security of Payment Acts were introduced with the intention of enabling claimant contractors and suppliers to swiftly recover progress payments for work undertaken under a construction contract and, where a payment dispute arises, provide for a rapid adjudication process. The legislative regime is meant to facilitate the quick flow of payment and to allow unpaid parties to suspend work until payment is received.[2] In practice however, the adjudication process is often not a quick and inexpensive alternative to the Court process, and subcontractors often continue to work notwithstanding their statutory entitlement to suspend work.

1.3 In assessing the success of the legislative payment regimes, it is also necessary to evaluate how the Acts interact with construction contracts. The 'East Coast Model', which Queensland, New South Wales, Australian Capital Territory, South Australia, Victoria and Tasmania are a part, involves greater statutory intervention than the 'West Coast Model' adopted in Western Australia and the Northern Territory. In practice, this means claimants operating under the East Coast Model rely heavily on the statutory payment process and less so on the payment terms under the relevant construction contract. This practice is perpetuated by inadequacies in the adjudication process, particularly the perception in several states that adjudicators are "pro claimant" and decide applications in favour of a claimant, without regard to the claimant's actual contractual entitlement to payment.

1.4 Comments regarding the South Australian legislation (**SA Act**) specifically:

(a) In February 2015, the SA Act was the subject of an extensive review by retired District Court Judge Alan Moss. Presently, there are proposals under consideration for amendments that are the subject of a Consultation Paper from the Small Business Commissioner, which have attracted significant attention

[1] Senate Economic References Committee (2015), *Insolvency in the Australian Construction Industry*, December 2015.
[2] See for example: Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2003, 70-2 (Robert Schwarten).

and submissions.[3] Proposals subject of the Consultation Paper have not yet been implemented.

(b) While it appears to be accepted that the legislation could be improved, the SA view, in the absence of the adoption of a national scheme, is that any amendment ought to be measured rather than revolutionary.

1.5 Comments regarding the Western Australian legislation (**WA Act**) specifically:

(a) The WA Committee prefers the contractual-based regime in Western Australia to the statutory regime adopted in other states. The WA Committee supports the findings of the recent review on the effectiveness of the WA Act.

(b) The principal findings of the review of the WA Act by Prof Evans on the issue of the effectiveness of the legislation published August 2015 were (relevantly) as follows:[4]

(i) *"The Review has indicated that the Act has been successful both as a statutory scheme for the evaluation of payment claims and in providing a quick and uncomplicated dispute resolution process."*

(ii) *"Unlike the Wallace Review of the Queensland security of payment legislation, this Review did not find that the Act had any polarising effect on the industry participants; that is, those who have benefitted from the provisions of the Act and those who felt they had been disadvantaged by the Act. All sections of the construction industry acknowledged the overall benefits of the Act, albeit with some suggestions for modification."*

(iii) *"In consideration of the responses to the issues raised in both the Discussion Paper and in the broad terms of reference for this Review, I find that no significant structural amendments to the Act are required."*

(iv) *"Throughout the Review it was noted that many issues affecting stakeholders did not result principally from significant deficiencies in the Act's provisions but from a lack of awareness of the Act and especially its primary objectives."*

(v) *"Additionally, many issues raised related to a general lack of understanding of the basic principles of contractual rights and obligations. There needs to be widespread education and training by all sections of the construction industry as well as additional efforts by the Building Commission to ensure awareness and compliance with the provisions of the Act."*

[3] This material is available at https://www.sasbc.sa.gov.au/security_of_payment/review-of-the-building-and-construction-security-of-payment-act-200

[4] Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA); See also his more recent paper "Statutory Review of the Construction Contracts Act 2004 (WA)" The University of Notre Dame Australia Law Review: Vol. 18, Article 4).

(c) In relation to the issue of harmonisation, Prof Evans' Review comments were as follows:

> *"The majority of submissions did not support legislative 'harmonisation' of security of payment legislation. There was a strong preference for the Construction Contracts Act 2004 (WA) to be the basis for any uniform legislation in the future. The research indicated serious issues with respect to the East Coast models of security of payment legislation with the academic writers proposing that any future uniform legislation should be based on the Construction Contracts Act 2004 (WA).*
>
> *In conclusion, the recurring issue throughout this review was the critical need for widespread education and publicity regarding the existence of, and the provisions of the Act. Unless this occurs as a matter of urgency and priority, the Act will not fully achieve its objectives for the benefit of all sections of the construction industry."*

(d) Prof Evans has made a number of recommendations for changes which he considered would assist in improving the operation and effectiveness of the Act in achieving its stated objectives. Most were accepted by the WA government and passed on 15 December 2016.

(e) One of the recommendations was to retain the 28 day period for applying for adjudication of a payment dispute. The government decided to extend the period to 90 business days. The WA committee have supported the current WA legislation although they remain sympathetic to Prof Evans' recommendation.

1.6 Comments regarding the New South Wales legislation (**NSW Act**) specifically:

(a) The NSW Committee considers that although there are elements in the legislation which need to be improved, the NSW Act is generally meeting its stated objectives. However, in achieving its goal, the legislation places respondents at a significant disadvantage to claimants.

(b) One of the NSW Committee's key concerns is the absence of restrictions in the legislation regarding certain types of claims such as time cost claims and latent condition claims. In our experience, those sorts of claims cannot be dealt with fairly within the current adjudication regime. In this respect, the restrictions contained in the Victorian legislation (sections 10A and 10B) which seek to exclude (amongst other things) claims in respect of disputes variations, time related cost claims and latent conditions claims are appropriate and ought to be included.

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

2.1 The Committee's view is that the objectives of the legislation would best be served by one simple set of rules applying to all payment claims, rather than Queensland's current two-tier approach. We understand the rationale behind the Wallace Report's recommendation to adopt a two tier system, particularly the concern that a 'one size fits

all' approach fails to cater for the varying complexity of claims.[5] However, for any statutory payment process to operate effectively it must be able to be easily understood and adopted in practice. This is particularly the case in the building and construction industry where parties who rely on the security of payment process are often unaided by lawyers. In our view, the splitting of claims into complex and standard categories unnecessarily complicates and elongates the payment process for little benefit.

2.2 A two tiered system based on the dollar value of the payment dispute fails to recognise that low value disputes can give rise to complex issues and high value disputes can involve straight-forward issues. Claims for amounts which fall within the standard claim framework are often just as complex as those which fall within the complex framework. This means a respondent has less time to respond to what is for all intents and purposes, a complex claim.

2.3 An appropriate solution in the Committee's view would be to adopt the system in place in Western Australia whereby adjudicators have the discretion to dismiss an application if too complex. This would inevitably reduce the need for any artificial two tiered system of complex and simple adjudications.

2.4 Interestingly in Queensland some practitioners, having been through the two-tier model, considered that greater efficiency could be achieved by adopting a three-tier model. Their view was along the following lines:

(a) A single 'one size fits all' category is not an appropriate model, considering:

(i) the limiting effect such a single tier model has on consequent matters such as timing of applications and response submissions. The practical outcome of a single tier of claims would mean that a payment claim with a quantum of $25,000 (a comparatively low sum), and a claim of a value of $1,000,000,000 would be subject to the same timeframes governing adjudication responses, and decision timeframes;

(ii) the relative disparity in complexity between claims of varying values, including evidentiary and legal onus that each party bears. Using the above example, it is trite to suggest that the evidence required to substantiate the respective claims is, in orders of magnitude, different and complex. In the case of a claim in the realm of the latter's value, there would be a significant denial of procedural fairness if an adjudicator is restricted by strict (and limited) timeframes in coming to a decision; and

(iii) the sophistication of parties at varying claim amounts/thresholds – and hence, the capacity to adequately respond in the timeframes afforded by a single set of timing and rules - the primary purpose of the security of payment framework is "aimed at addressing inherent imbalances in bargaining power which exist between small subcontractors and head contractors". Such imbalances are, in practice, evidenced by variances in capacity to deal with claims (if at all), and the burden of legal costs

[5] Andrew Wallace (2013), *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry*, May 2013, pp.182-183.

that are invariably by contractors of any size in preparing or responding to any adjudication applications/claims.

(b) While the 'one size' approach does suggest a relative certainty in the pursuit of payment claims, any utility in this is ultimately eroded by the consequent inadequacy of such a model in handling claims of significant complexity.

(c) The suggested tiering might look like this:

(i) claims of a value of $30,000.00 or less;

(ii) claims of a value of $30,001.00 to $750,000.00; and

(iii) claims of a value of $750,000.00 or more.

(d) It was also suggested that (in the absence of a delineation in types of claims) a monetary cap or threshold be imposed on claims (not contract values) exceeding a certain figure (as adjusted by regulation). In this regard, the provisional figure of $20,000,000 was put forward.

2.5 The Committee recognises that there is a point to be made in tiering the size and type of claim with commensurate timeframes within which claims could be made and responded to. However, the effect of this would be to make the process more cumbersome and complex and therefore on balance, it is the Committee's view that a 'one size fits all' approach, while not perfect, is the preferred approach.

2.6 ***Recommendations***

2.7 The legislation should not provide for separate types of claims.

2.8 Adjudicators should have the discretion to dismiss adjudication applications that are too complex, as is currently the case in Western Australia.

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.)?

3.1 There are obvious problems with setting arbitrary boundaries that are either issues-based or quantum-based. If split on value, simple issues may become unduly delayed by reason only of their value. If split on nature of the claim, there are further grounds for dispute over what the true ‘nature’ of the claim is.

3.2 We suggest the ‘bright line’ of a dollar amount is preferable because there is less scope for costly debate and manipulation on the question of value as opposed to type of claim.

3.3 If a dual model approach is considered viable, we suggest the monetary limit of $750,000.00 currently adopted in Queensland is too low.

3.4 ***Recommendations***

3.5 Should a dual approach be adopted, it should be distinguished based on quantum.

3.6 In respect of the monetary limit for such a distinction, the Committee considers $1.5 million would be an appropriate limit to distinguish standard and complex claims.

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

4.1 In assessing the appropriate period in which payment claims may be served under the Act, regard must be had to the requirements of the actual commercial bargain struck between the parties and business efficacy. Most states have legislation which governs the period within which contracts must prescribe the payment regime under a construction contract or, if the contract is silent, prescribe a 'no later than' date by which claims may be made.

4.2 The commercial bargain between the parties should not be unnecessarily interfered with. Therefore the question of 'appropriate period' must be taken into account in that context. Where the contract prescribes a time period within which a payment claim should be made, we consider that the appropriate period ought to be equal to that time period. This is because at tender stage when the parties strike a bargain, they are aware of the conditions on which payments and claims will be made and can decide to either tender or refrain from tendering.

4.3 The question can be divided into two parts: the appropriate period in the course of the actual execution of the work, and the appropriate period following completion of the work.

4.4 While the work is being executed, it ought to be on a monthly basis or as measured against the achievement of milestones as the contract requires. That is to say that work ought to be performed and the payment claim lodged contemporaneously with the completion of that work. Claims ought not to be able to be stockpiled and then made at a later reference date.

4.5 Following completion of the works, the current 12 month allowance under the Queensland and New South Wales legislation is too long. Allowing a claimant 12 months to formulate a claim and requiring the respondent to respond to that claim in, at best, 30 business days, creates a significant disadvantage to respondents. This is particularly so in the case of standard payment claims in Queensland, where a respondent has only 10 days in which to respond, and is not entitled to include any new reasons for non-payment in its adjudication response. The model adopted under the Victorian Act (that is, 3 months after the completion of work) is more fairly balanced.

4.6 It should be noted that we do not recommend interfering with the Defects Liability Period (**DLP**) which is a separate issue following post completion. The DLP underpins the quality of the work and the Principal's ability to retain security and governs the final realisation of the contract accounting upon its completion.

4.7 ***Recommendations***

4.8 General consensus:

(a) A timeframe of 3 months to serve a payment claim from the relevant reference date while work is ongoing; and

(b) A timeframe of 6 months to serve a payment claim following the completion of works.

4.9 Alternative WA position:

(a) In the absence of a specific contract term specifying when payment claims may be made, Sched 1 Div 3 of the WA Act allows payment claims by a contractor to be made at any time after performance of obligations. This position is recommended. It allows maximum flexibility, although it is recognised there is a risk of stockpiling of claims.

(b) If it is considered there should be a default time limit, perhaps it should mirror the amount of time allowed to make an adjudication application (presently 90 business days in WA). It would be unfortunate if a contractor completely lost its rights simply by failing to hit a tight deadline for the initial claim

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

5.1 The primary consideration should be the terms of the contract.

5.2 ***Recommendations***

5.3 The Committee recommends that, unless the construction contract provides for payment to be made on an earlier date, the due date for payment of a progress payment should be between 15 and 30 days following the receipt of a valid progress payment/claim in a proper form.

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

6.1 Contractually, payment of the subcontractor is an entirely separate issue to payment of a head contractor. The subcontractor is entitled to payment irrespective of whether the head contractor is also entitled to payment. It is incumbent on a head contractor to ensure that it has the funds to pay its subcontractors irrespective of whether it has received payment from its principal. A method which allows different time frames for payment creates a system where a head contractor may be reliant on receiving payment from its principal before it is able to pay its subcontractor.

6.2 Further, the imposition of extended periods for payment for subcontractors does not accord with the objectives of the respective security of payment regimes insofar as it extends the time in which a subcontractor remains unpaid for works undertaken.

6.3 However, the Committee acknowledges that the different due dates for payment for head contracts and subcontracts introduced into section 11 of the NSW Act are working well. As such, the Committee is open to different timeframes for payment to subcontractors and head contractors. The key is ensuring subcontractors have sufficient rights to obtaining payment.

6.4 ***Recommendations***

6.5 The Committee recommends there should not be different timeframes for when payment becomes due under head contracts and subcontracts.

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 Respondents should be provided enough time to meaningfully assess and respond to payment claims, particularly in circumstances where claimants spend up to 12 months developing their claims. Having sufficient time to respond benefits not only respondents but also claimants who, if provided with a more thorough and considered response, are placed in a better position to accurately assess the commercial benefit of making an adjudication application. If the respondent has good grounds for non-payment, a claimant should be entitled to know those grounds.

7.2 To allow sufficient time to formulate an effective response, the Committee considers a timeframe of 15 days is appropriate.

7.3 Any benefit gained from increasing the time for respondents to provide a payment schedule must be weighed against the burden of the additional time and expense incurred in the context of the overall payment process. In Queensland, the effect of increasing the respondents' timeframe from 10 to 15 days would not add significantly to the time and expense of the payment process overall, particularly if the time provided for claimants to serve a payment claim is reduced. These timeframe adjustments would be a step towards levelling the playing field between claimants and respondents, particularly the perception that the Acts are currently unfairly balanced in favour of claimants.

7.4 ***Recommendations***

7.5 General consensus:

(a) The Committee recommends that the respondent be required to provide its reasoned payment schedule within 15 business days after the payment claim is served; and

(b) The respondent is not entitled to include reasons for withholding payment in an adjudication response that were not included in the payment schedule.

7.6 The WA position:

(a) The timeframe should be whatever the contract says.

(b) The default position is 14 days (under an implied term), although this could be increased slightly (eg to, say, 15 business days) to allow for the fact that there are sometimes large or complex claims that would be more fairly responded to if a slightly longer period was allowed.

(c) The respondent should not be limited in any later adjudication to the arguments raised in the response.

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

8.1 ***Recommendations***

8.2 General consensus:

(a) The appropriate timeframe to be given to a claimant for the lodgement of its adjudication application should be between 10 and 15 business days.

8.3 Alternative position taken by WA:

(a) The WA Act was amended in December 2016 to extend the time for an adjudication application from 28 days to 90 business days from the time a payment dispute arises. The Northern Territory has 90 days. The WA position is that it agrees with the 90 (business or ordinary) day period although remains sympathetic to Prof Evans' recommendation that 28 days remains. The reasons for a longer period than just 10-15 business days for adjudication applications is to enable the parties to have sufficient time to properly discuss the dispute, seek commercial resolution by negotiation and otherwise prepare a claim if that is necessary. 10 to 15 business days does not allow sufficient time and 'tips' the dispute too quickly into adversarial adjudication.

(b) Recommendation:

(c) The appropriate timeframe to be given to a claimant for the lodgement of its adjudication application should be 90 business days or alternatively 90 days.

9. What should be the appropriate timeframes to be given to a respondent to prepare its response to the claimant's adjudication application?

9.1 ***Recommendations***

9.2 The appropriate timeframe to be given to a respondent to prepare its response to the claimant's adjudication application should be 15 business days.

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

10.1 A balance must be struck between the possibility/probability of procedural fairness being denied should the adjudicator be restricted from properly exercising his/her discretion, and conversely, the convenience and purpose of the security of payment regime as general 'supplement' to the existing contractual regime.

10.2 To this end, the general position within existing jurisdictions of between 10 and 15 business days is representative of this balance and is an appropriate timeframe. The Committee does not consider any longer default period (particularly considering the possible extensions of time that may expressly or implicitly occur) serve the interests of any party.

10.3 The legislation should provide for a modest extension of time to be granted where the circumstances warrant further time. There is a practical issue in that an adjudicator may

request further time without offering a clear reason; one suspects often because they are generally busy. Neither party is game to refuse the request for fear of upsetting the adjudicator. In this respect, we suggest a long-stop date should be included of 20 business days.

10.4 ***Recommendations***

10.5 The Committee recommends that 10 business days from the date of acceptance of appointment be the default period within which an adjudicator is required to make a determination or decision.

10.6 The Committee recommends that the legislation should provide for a modest extension of no more than 20 business days to be granted where the circumstances warrant further time.

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

11.1 The Committee was not able to reach a national consensus on this issue. There was however, a general theme of support for establishing (or retaining) one independent body with responsibility for the appointment and regulation of adjudicators.

11.2 The Qld position:

(a) The independence and impartiality of adjudicators is crucial to the objectives of the BCIPA. The current system in Queensland whereby adjudicators are appointed by the QBCC (an independent regulator) is preferable to states that use private providers. Parties should not be allowed to select the adjudicator as such an entitlement would invariably result in parties opting for adjudicators who are perceived to be either claimant or respondent friendly.

(b) In Queensland, adjudicators are allocated by the QBCC using the 'cab rank' principle. While good for its impartiality, this method leaves the adjudicator (and their level of relevant experience) completely to chance. In our view, a better approach would be to introduce tiers of adjudicators (for example, senior and junior) and then use the cab rank principle to allocate an adjudicator within the particular class to the relevant adjudication application. For example, senior adjudicators could be allocated complex claims (if such a category remains in the Act) or claims over a dollar amount (say, $1 million). While creating categories of adjudicators does, at first glance, complicate rather than simplify the Act, the burden of this change would be borne by the QBCC.

(c) Recommendation

(d) The current process in Queensland is appropriate but could be improved by implementing categories of adjudicators.

11.3 The SA position:

(a) In the South Australian Discussion Paper there was a proposal for the appointment of a sole nominating authority being an independent Government

body (the Small Business Commissioner).[6] The role of 'for profit' authorised nominating authorities was recognised by many submissions as a serious concern and such bodies have been the subject of adverse judicial decisions.[7] There was some support for the appointment of a sole nominating authority through the appointment of an independent body. Some submissions questioned whether the proposed body would have the ability to be perceived as sufficiently independent given the role of the Small Business Commissioner as an advocate for small business.

(b) There is a need for the sole nominating authority to have the necessary expertise and experience in the market in making appointments. The adoption of a 'cab rank' principle permits no matching of skills and background to issues. Some submissions suggested that there might be an effective mechanism in simply prohibiting 'for profit' nominating authorities so as to limit the role to not for profit bodies.

11.4 The WA position:

(a) The present process of approval of nominating authorities is working sufficiently well.

(b) Parties should be allowed to select the adjudicator or approved authority in their contract.

(c) One view (not necessarily one held by all WA committee members) is that the nominating authority should not be left to the applicant if not nominated by the contract and a default nominating authority should be identified by legislation.

11.5 The VIC position:

(a) Concerns were expressed in relation to the interests of the Authorised Nominating Authorities (**ANAs**) being aligned with claimants.

(b) Generally speaking, there was support for the establishment of one independent body with responsibility for the appointment of adjudicators.

(c) ***Recommendations****:*

(i) Parties be entitled to appoint the adjudicator by agreement within a limited timeframe (say 5 business days) following the adjudication application;

(ii) Failing agreement within the required timeframe, the adjudicator should be appointed by an independent body with responsibility for the appointment of adjudicators. The 'independent body' should be independent of government, as many appointments involve government agencies.

[6] This material is available at https://www.sasbc.sa.gov.au/security_of_payment/review-of-the-building-and-construction-security-of-payment-act-200

[7] see *Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors* [2013] SASC 84.

11.6 The NSW position:

(a) As with the VIC position, there are concerns that a number of ANAs are aligned with claimants. There is support for the establishment of one independent body with responsibility for the appointment and regulation of adjudicators as opposed to the current process.

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

12.1 The quality of adjudication outcomes is currently unpredictable. The necessary circumstances of an interim assessment in a limited time does provide practical limits on the ability for even suitable adjudicators to properly do justice to all issues. The need for speed in the process may be sufficient to justify the levels of unpredictability experienced. Unpredictability may be countered if there are limited rights of review before an administrative tribunal. The demands of the system suggests that greater focus be on the training at the outset to be an adjudicator and ongoing training required to maintain the right to be an adjudicator would likely benefit users of the system.

12.2 In Queensland, where the appointment of adjudicators is left entirely to chance, the quality of adjudication decisions varies widely. The general theme however, is that adjudicators tend to adopt the model of 'every child gets a prize' regardless of contractual entitlement. There is perceived to be very little consideration given to the actual wording of the contract, to which the parties have independently agreed. This is particularly so in relation to the notice requirements, which usually exist as pre-conditions to entitlements to payment.

12.3 Adjudication decisions are seen to be moderate, rather than firmly deciding entitlement one way or another. It is possible that the reason for this is that adjudication decisions are interim in nature and parties can invoke the jurisdiction of the Courts to finally determine their contractual entitlements. This should not be the mindset of adjudicators. Any costs saved in going through the adjudication process are swiftly burnt when parties are forced to litigate to achieve a contractually correct decision.

12.4 Improving the quality of adjudication decisions will mean fewer parties bearing the additional expense, delays and uncertainty inevitably involved in contested court proceedings. Recommendations for improving the quality of decisions are set out below in response to question 13.

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

13.1 ***Eligibility requirements***

13.2 There should be eligibility criteria for registration as an adjudicator, demonstrating the capacity of an applicant to fulfil the role of an adjudicator. Undoubtedly complex and/or large adjudications should be conducted by those adjudicators with more experience. However, it should not be the case that insufficiently experienced persons should be given the opportunity to 'practice' on simpler or smaller adjudications. Adjudication participants in the latter case are just as entitled to have a 'correct' decision as those in the former. The question surrounding this central issue is: how do less-experienced persons obtain experience? One way would be for aspirant adjudicators to be mentored by recognised experienced adjudicators (even to the point of preparing draft decisions

which can later be critiqued by the experienced adjudicator or a panel of persons who determine the eligibility of a person to be an adjudicator).

13.3 Adjudicators should have, as a minimum, a solid understanding of the legal principles relating to contractual interpretation, as well as a period of actual application of that knowledge. Further, as adjudications often involve complex technical arguments, adjudicators should also be required to meet a minimal level of experience in the construction industry. Adjudicators should have real world experience either as a lawyer or in a contract administration role.

13.4 In New South Wales the relevant skills and qualifications of the adjudicators appointed varies widely. Noting that the average value of adjudications in New South Wales has increased significantly since 2013, it is not unusual for adjudicators to be determining disputes which, if litigated, would be before a District Court or even Supreme Court Judge. For this reason it is submitted that a clear framework should be implemented to ensure that the right adjudicator is appointed.

13.5 The Committee notes the South Australian system by which the regulations mandate minimum requirements for adjudicators is supported in that State. There is an ongoing need to review whether the requirements are up-to-date and sufficient.

13.6 ***Ongoing professional development***

13.7 All adjudicators should be required to complete continuing education to ensure that their respective knowledge remains current. Adjudicators (irrespective of experience) should have their decisions reviewed and critiqued on a sufficiently regular basis to ensure that they meet an appropriate standard. Further, if an adjudicator's decisions are subject to judicial review and found to be wanting, consideration should be given to what (if any) steps should be taken. This is not a case of considering a sanction – even judges have decisions overturned on appeal. Rather, the process should be to consider whether the decision could have been correctly decided and, if so, what improvements will allow that to occur.

13.8 ***Review of adjudicators' decisions***

13.9 Adjudications are decided on written material only and are given within a limited time frame. Necessarily, therefore, adjudications will not deliver an outcome of the quality of a well-prepared and contested dispute resolution process with a reasoned decision from a judge or arbitrator. That said, adjudication participants are entitled to expect that, within the constraints of the process, the decision will correctly identify the law and then correctly apply the law to the facts as determined by the adjudicator. In short, adjudicators are expected to get the law right.

13.10 It is recognised that the process is interim and the decision is not intended to be one equivalent to the quality of that delivered through the contractual dispute resolution process. However, as has been indicated, the reality is: that although interim, decisions are effectively final because the cost of pursuing the contractual dispute resolution process cannot be justified. Particularly in that context, it is the role of a process to deliver the best outcome for the parties. Allowing the judiciary to quickly dispose of errors of law should not harm the principal objective of the process; namely, ensuring that there is timely payment through the contractual chain. Further, allowing decisions which are the subject of errors of law to stand does not achieve that objective. The

ability to correct errors of law, if adopted, could be aided by an ability to remit a matter to the adjudicator for a decision.

13.11 The Committee notes that the judicial review of adjudication decisions is currently a "live issue" given the High Court's recent decision to grant special leave in the long running cases of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor*[8] and *Maxcon Constructions Pty Ltd v Vadasz & Ors*[9], both of which concern whether adjudication decisions can be overturned for non-jurisdictional error.[10] As such, the Committee does not consider it appropriate to make a recommendation on whether adjudication decisions should be capable of judicial review for errors of law.

13.12 However, the Committee considers that anything that can be done to give certainty on when judicial, or other review, is available for an adjudication determination would be useful for the construction industry.

13.13 ***Recommendations***

13.14 Adjudicators should have minimum eligibility requirements.

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

14.1 ***Claimants in liquidation***

14.2 In Victoria, the Supreme Court of Appeal has held as a matter of statutory interpretation that the summary payments regime only applies to trading claimants that are not in liquidation.[11] The Court of Appeal relied upon:

(a) the purpose of the Victorian Act which refers to claimants "who carry out construction work or who supply related goods and services …";[12]

(b) the alternative remedy available to unpaid claimants to suspend construction work pending payment – suggesting the Victorian Act presumes claimants are still carrying out construction work; and

(c) a characterisation of Part 3 of the Victorian Act as an "interim payment regime"[13] and the availability of restitution of amounts paid under that Part in subsequent proceedings between the claimant and the respondent.[14]

14.3 Further, the extrinsic materials for the Victorian Act supported this interpretation:

(a) the second reading speeches for the Victorian Act and its NSW equivalent indicate their driving concern was cash flow problems experienced by smaller players within the construction industry. That concern was addressed by shifting the risk of insolvency from the subcontractor to the head contractor and was no longer present for a company in liquidation; and

[8] [2016] NSWCA 379.
[9] [2017] SASCFC 2.
[10] We note this is the only remaining aspect of *Brodyn v Davenport* [2004] 61 NSWLR 421.
[11] *Façade Treatment Engineering Pty Ltd v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247.
[12] Victorian Act, s 1.
[13] See *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2005) 21 BCL 443, 445; *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* (2009) 26 VR 172, 202; *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 339.
[14] Victorian Act, s 47(3).

(b) the s 553C set-off procedure has a long legislative history and the State legislature was aware of that when it enacted the Victorian Act (see below).

14.4 The position is different, at least in NSW, in relation a claimant who is subject to a Deed of Company Arrangement under Part 5.3A of the *Corporations Act 2001* (Cth) (**Corporations Act**).[15] The distinction being that:

(a) the purpose Part 5.3A of the Corporations Act is to maximise the prospect of a company's financial recovery by improving cash flow. A concern which does not arise for a company in liquidation; and

(b) there was no s 553C equivalent in Part 5.3A of the Corporations Act.

14.5 The Court of Appeal also concluded that summary judgment in favour of an insolvent claimant under Part 3 of the Victorian Act would "alter, impair or detract from" the operation of the Corporations Act in the words of s 109 of The Constitution if there were competing claims between claimants and respondents. This was because automatic set off under s 553C of the Corporations Act precludes companies in liquidation taking advantage of the summary progress payment regime under the Victorian Act.

14.6 Section 553C is the insolvency set-off provision. In summary, it provides that where there have been mutual credits, mutual debts or other mutual dealings between a company in liquidation and a creditor, then an account is taken of what is owed by one to the other and the two amounts are set-off against each other, so that only the balance is admissible to proof against the company or is payable to the company. The provision is designed to address the injustice whereby an insolvent entity in liquidation might obtain 100 cents in the dollar on its claim against a third party, while the third party is left with a pari passu distribution in the liquidation on its own claim.

14.7 It is noted that the reasoning on constitutional inconsistency in Victoria may not apply in other states where the relevant state legislation was enacted prior to the Corporations Act.[16]

14.8 ***Other potential claims to be excluded***

14.9 Competing views were expressed in relation to the types of claims which should be excluded from the Act. A balance needs to be struck between the need to protect vulnerable participants in the construction industry against the risk of inefficient and ill-considered adjudications resulting in increased litigation.

14.10 On one view, to protect the cash flow of those operating in the construction sector, all claims under the contract should be capable of being adjudicated upon. This would allow claims under the contract (if the contract so allows) for:

(a) variations;

(b) time related claims;

(c) latent conditions;

[15] *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd* [No 3] [2007] NSWSC 459.
[16] *In the matter of Linc Energy Limited (in Liquidation)* [2017] QSC 053.

(d) changes in regulatory requirements; and

(e) damages for breach of contract.

14.11 Claims under the contract would exclude, for example, claims under the Australian Consumer Law.

14.12 The competing view is that to permit the legislation to extend to all contractual claims will allow claimants the opportunity to ambush respondents with complex claims on multiple bases resulting in ill-considered and rushed decisions of adjudicators who may face difficulty with the task particularly those adjudicators who do not have legal training.

14.13 Further, that where this occurs, there is the potential for the adjudication to become the rehearsal for protracted litigation over the adjudication determination and the interpretation of the Act. This will add another expensive and time consuming step to the resolution of the amount payable which is contrary to the objectives of the Act to provide a quick and cost effective interim process for payment of progress claims.

14.14 On balance, it is the general consensus of the Committee that all types of claims under the contract should be capable of being adjudicated upon.

14.15 ***Recommendations***

14.16 Companies in liquidation should be excluded from the Act for the reasons articulated by the Victorian Court of Appeal in relation to the statutory interpretation of the Victorian Act.

14.17 Claimants should otherwise be able to pursue claims for work performed under the contract, whether they are claims for variations, latent conditions, delay costs or other entitlements.

14.18 ***An alternative recommendation***

14.19 If the recommendation at 14.16 is not adopted, then the following alternative recommendation is suggested:

(a) Companies in liquidation should be excluded from the Act except where the following circumstances are met:

(i) the contract is not terminated by the appointment of a liquidator; and

(ii) the contract has not been disclaimed by the liquidator under the Corporations Act.

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

15.1 ***Recommendations***

15.2 The Committee recommends that a separate further reference date be provided for after a purported termination or suspension, or where works have been taken out of the

hands of a would-be claimant, by the party which would otherwise be the respondent to a payment claim.

15.3 The Committee supports the comments and reasoning on this point as set out in the Wallace Report.[17]

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 While no national consensus was reached, there was a prevailing view of those operating under the Queensland and Victorian schemes that lessons learned in the development of the Australian Consumer Law might apply here.

16.2 We note that the relevant sections of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and the Australian Consumer Law ("**ACL**") only apply presently to small business. The sections do not provide a prescriptive statement as to when a contract clause will be "unfair". Rather, the definition of when something is unfair (and hence void) includes where it would cause a significant imbalance in the parties' rights and obligations and it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it.

16.3 Importantly, any proposal should be structured such that it can apply to the whole of the contractual chain. Delays and extensions of time can affect the entire contractual chain (e.g. a delay to a subcontractor needs to be notified to a contractor within a time such that the contractor, if appropriate, can comply with the EOT clause in the head contract).

16.4 In the case of a short notice period for an EOT or variation or other claim to be able to be claimed, the circumstances of the project would need to be considered and, in the case of a subcontractor, whether the head contract requirements are such that a short notice period is necessary.

16.5 Generally, the legislation should not interfere with participants' rights to arrive at their own commercial terms in regard to a project.

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

17.1 See response to question 16 above.

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 See response to question 16 above.

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

[17] Recommendation 47 of the Wallace Report: The BCIPA should be amended to expressly provide that a claimant's entitlement to serve a final payment claim is not extinguished post-termination of the contract.

19.1 The use of a payment claim is the commencement of a statutory process with severe consequences if timelines are not adhered to. It is essential that a respondent is aware that the document provided goes beyond that of an invoice.

19.2 The removal of the endorsement will imply that all invoices (from parties defined in the Act) are payment claims. It is likely that this implication will remove the ability for the parties to resolve the matter commercially. It is sometimes the case in residential matters or matters involving smaller sums that a claimant will first provide an invoice without the endorsement. This allows the parties to discuss the payment terms or the details of the invoice amicably without strict timelines of the Act applying. It is only after continual delays in payment that a payment claim is provided to commence the statutory process. This informal process would not occur if it is implied that the invoice is a payment claim as the statutory deadline for a payment schedule to be lodged will automatically commence. It is also noted that a claimant is prohibited under the Act from providing the same payment claim twice.

19.3 The Committee submits that any requirement for every claim to be a claim under the Act does not improve the system. It simply disadvantages both parties (and indeed the adjudicator) equally.

19.4 Additionally, in practice, the work required for a payment schedule is generally more than that for a progress certificate under the contract. If every payment clam is mandated to be a claim under the Act, it will require a respondent to perform the more detailed analysis on every claim irrespective of whether the claim is intended to be a payment claim under the Act.

19.5 One alternative adopted in the Qld Act (resulting from the Wallace Report) is that for claims made more than 90 days after the reference date to which the claim relates, a respondent has a longer time to deliver its payment schedule. Interestingly, a similarly longer period is not given for delivering an adjudication response (despite much of the detail of a claim being contained in an adjudication application).

19.6 For “stale” claims (ie. claims which relate, at least in part, to work performed some time previously), a respondent should be given more time to respond.

19.7 The South Australian system requires an endorsement and is seen as a necessary step to telegraph the party’s intention, reducing the chance of any inadvertent activation of the Act and focusing the mind on the requirements of a payment claim. If the Act can be inadvertently activated the interaction with the limitation on more than 1 payment claim in respect of each reference date under the construction contract can create adverse outcomes contrary to the intent of the Act.

19.8 ***Recommendations***

19.9 The general consensus:

(a) Payment claims should be endorsed with a statement similar to “this is a payment claim made under the Act”;

(b) Payment claims should provide the period for which a response is due and the potential consequences for failing to do so; and

(c) Access to a standardised payment claim or at the least a standardised endorsement, should be available for all contractors.

19.10 The WA position:

(a) All payment claims can be adjudicated and there is no need for an endorsement that the payment claim is one to which the WA Act applies. NSW has recently adopted this position. This gives maximum flexibility to the parties to pursue their payment claims without additional legal formality.

(b) Endorsement can send a message that non-endorsed claims may not be pursued and need not be paid.

(c) One of the 'cons' of the WA Act is the 14 day default implied term which deems acceptance of the payment claim if no response received in the period and to the extent not disputed, the undisputed amount becomes payable – the adjudicator does not consider the merits at all (no matter how flawed or baseless a claim may be) and the parties may not have even realised that the term applies.

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

20.1 See response to question 19 above.

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

21.1 The Committee acknowledges that increasing transparency may assist with unified decision making by the adjudicators, an issue that becomes more relevant when attempting harmonisation of legislation across Australia.

21.2 However, given the fast and interim nature of the adjudication process and the relative informality usually seen in adjudicators' reasoning, the Committee does not see the utility in publishing determinations.

21.3 We note that in Victoria copies of all adjudications are required to be provided to the Victorian Building Authority, which can exercise a quality control function (this might be exercised by a federal body under harmonised legislation). However, a requirement that they be published is likely to result in less use of the scheme being made if details are made available to the public.

21.4 ***Recommendations***

21.5 The Committee recommends against the publication of adjudication determinations.

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 ***Recommendations:***

22.2 The Committee recommends that the Courts should have powers to:

(a) sever the part of an adjudicator's decision that is declared void with the balance to remain an enforceable decision; and/or

(b) remit the decision back to the adjudicator; and/or

(c) make a decision in place of the original adjudication decision.

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 While there was not national consensus on this issue, there was no objection to the Queensland recommendation, which is as follows:

23.2 Consideration should not be given to the establishment of statutory trusts.

23.3 The intent of project bank accounts/statutory trusts (**PBA**) is commendable, particularly for its primary target: namely, where an industry participant is insolvent. However, as with many reforms "the devil is in the detail". It is submitted that on a cost/benefit analysis, PBAs do not offer a practical solution for several reasons which are set out below. Therefore an alternative is offered to address the unacceptably wide impact which insolvency has in the construction industry.

23.4 *Limitations of a PBA solution*

(a) The Committee submits that PBAs are not a practical solution for the following reasons:

(b) PBAs quarantine progress payments from the Principal to the head contractor. The quarantine period is short. A financially distressed head contractor (with control of the accounts) can time the appointment of an administrator/ liquidator so that the liquidation/administration occurs after payment out of the PBA.

(c) Under most PBA systems, the head contractor retains control of the account (determining to whom money is paid and how much is paid to each person). There is no guarantee that the head contractor (with control of the account) will not siphon money off to prop up its financial distress (e.g. other unprofitable projects).

(d) While the money in a PBA is held in trust, there is limited information as to how the PBAs will operate where an insolvency occurs. The trust arrangement will give rise to complex disputes, such as:

(i) What are the terms of the trust? It is proposed that there be a trust deed (the terms of which presumably will be regulated by legislation). The issue will be how the deed deals with issues such as those identified below.

(ii) If the money is held on trust for (in part) the head contractor and (in part) the subcontractors, how is the subcontractor's entitlement quantified?

(iii) In the PBA, how much is each subcontractor entitled to (e.g. the amount of its claim; the amount assessed by the head contractor; an amount determined in any dispute resolution process)?

(iv) If the entitlement of a subcontractor is to the amount in fact owed (ie. as determined in dispute resolution), what if the head contractor (innocently) pays a subcontractor its assessment which is less than the amount in fact owing? Is the head contractor acting in breach of the trust?

(v) If the head contractor uses the trust funds in breach of the trust, which subcontractor's entitlement is used?

(vi) It may be possible to "trace" payments made in breach of the trust. However, if money is used to repay a debt (for which there is no substitute asset such as payment to a subcontractor on another project) and at least some of the money cannot be traced, which subcontractor bears the loss or if all bear the loss, in what proportion?

(vii) The scenarios can increase in complexity (e.g. the trust money is intermingled with the head contractor's funds in an overdraft account).

(viii) What will the cost be to "trace" the funds? How far back in time can the tracing go? Presumably, it could go back to the first progress payment if the head contractor acts in breach of the trust (whether deliberately or innocently).

(e) PBAs will not assist where the insolvency of a head contractor is caused by the insolvency of, or non-payment by, a Principal.

(f) Under PBAs, retention moneys are protected for the long term. However, those moneys often provide valuable cash flow to a head contractor. Additionally, the ability to use retention money to cash flow projects lowers project costs. Further, the administration of two bank accounts per project will add administrative costs to the head contractors' budgets. This reform could stifle economic activity.

(g) If PBAs are to be used, a simple system must be devised to ensure the trust money is directed to the correct beneficiaries (with limited financial and administrative burden).

23.5 ***Application in Western Australia***

(a) The Committee refers to the experience of Western Australia, and notes the commentary of Ms Claire Turner, Special Counsel at Minter Ellison who noted in her Australian Construction Law Bulletin article that as a result of Western Australia's trial of project bank accounts, its Department of Finance released a report summarising its trial. Ms Turner states:

(i) *"It found that accounts can be successfully used on government projects and that all payments were able to be made within the contractual timeframe. In addition, accounts improved the transparency*

of the payment process, and gave the principal greater visibility over how monthly payments were being made to subcontractors."

(b) Ms Turner notes however, that the Western Australian Government's Department of Finance report also listed issues, including:

(i) contractors did not find the accounts simple to establish;

(ii) contractors cited difficulties in managing the legal documents and obtaining approval from interstate head offices;

(iii) there were views that the use of accounts could delay payment to subcontractors who were generally paid on a 7 day basis, and that the monthly payment process was cumbersome for contractors;

(iv) there was a potential for PBAs to have an adverse impact on contractor-subcontractor relationships; and

(v) the use of PBAs was found to add to constructors' costs with extra administrative staff and bank fees.

(c) Significant concern was experienced at a commercial level, where a subcontractor may require payment earlier than is prescribed under a contract for cash flow reasons. PBAs may also prevent contractors from being able to approach subcontractor cash flow issues commercially (for example, by making earlier payment) because the relevant money would be tied up in the PBA.

(d) Given the cost of administering such accounts both for the government and contractors, it is essential that prior to commencement there is clear evidence that PBAs will address the concerns it is expected to correct.

23.6 ***Proposed Alternative***

(a) The fallout from an insolvency is significant. Industry participants (and their families) downstream from the insolvency party encounter significant hardship – some never recover. While one insolvency is too many, the frequency of insolvencies is not high compared with the number of industry participants. The key issue is the impact which any insolvency can have on many other industry participants.

(b) The PBAs may help on occasion to protect subcontractors but they will be of limited benefit in many cases of insolvency. It is the few "bad apples" in the industry rather than the industry as a whole which need to be addressed.

(c) An improved audit system to identify the "bad apples" and then ensure that they are managed better so as to limit the fallout. To ensure transparency, a panel of approved auditors could be established (reporting to the QBCC) which all industry participants must use. The audit system could flag industry participants "at risk" and which would then lead to a more detailed audit to establish whether action is required to prevent insolvency.

(d) The cost of the audit could be a cost borne by each industry participant.

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 The Committee recommends against the adjudication system being extended to apply to private individuals in the context of domestic building work.

24.2 In Queensland, there are currently two systems governing the recovery and dispute of progress payments throughout the residential building chain. The first being the system set down in the Qld Act for a subcontractor or supplier against a builder and the second being the process available between a builder and homeowner.

24.3 The concern for a domestic builder is the inconsistency between the two systems as it can often be the case that a builder is required to pay the subcontractor's or supplier's payment claim whilst the homeowner has refused payment. The ramifications for a builder can be quite severe as a failure for a builder to maintain the appropriate liquidity can result in suspension of their building licence. Despite most residential building contracts providing no, or only a limited right of set-off for the homeowner, it is often the case that a homeowner will refuse to make payment until a dispute is resolved (especially at the stage of practical completion).

24.4 In Queensland, to recover its debt the builder must commence proceedings with the Queensland Civil and Administrative Tribunal (**QCAT**) or some other alternative dispute resolution process, as the contract requires. The homeowner may provide a response, file a counterapplication or lodge a complaint with the Queensland Building and Construction Commission (**QBCC**) in accordance with the Rectification of Building Work Policy. The process to resolve the dispute is often protracted with homeowners being afforded 14 days from the receipt of the QCAT application to file and serve its response or counter-application. Notwithstanding this timeline, homeowners are often given leniency with default proceedings rarely being awarded providing a response or counter-application is filed before the default hearing date. These types of delays combined with the limited availability of tribunal hearing dates often result in major delays in the final resolution of the payment dispute.

24.5 The obvious concern in extending the adjudication system is the lack of knowledge a homeowner would have in dealing with the stringent requirements of any security of payment legislation. It may be the case therefore that the current system of payment disputes with a homeowner being dealt with by QCAT should remain. It is essential however, that amendments are made to both to the *Queensland Building and Construction Commission Act 1991* (Qld) and the *Building and Construction Industry Payments Act 2004* (Qld) to ensure conformity in the deadlines regarding when responses/payment schedules and the final tribunal decision/adjudication is due.

24.6 In Victoria, State legislation exists to regulate domestic building work. Refer the *Domestic Building Contracts Act 1995* (Vic). Likewise, in New South Wales, the *Home Building Act 1989* (NSW) already regulates domestic building work and payment to builders.

24.7 ***Recommendations***

24.8 The general consensus:

(a) The adjudication system should not be extended to include the housing sector.

24.9 The Qld position:

(a) Amendments should be made to the *Queensland Building and Construction Commission Act 1991* (Qld) and *the Building and Construction Industry Payments Act 2004* (Qld) to ensure a consistency in deadlines.

(b) Alternatively, the *Queensland Building and Construction Commission Act 1991* (Qld) be amended to prevent a homeowner from filing a cross-application for defective work in response to a claim for a progress payment. Any applications regarding defective work should be dealt with separately either through the Rectification of Building Work Policy or an appropriate claim for damages.

24.10 The WA position:

(a) The Western Australian regime has no limits and none are recommended.

(b) The WA Act allows for all construction work to be included within the operation of the WA Act, including residential construction, and all forms of construction payment claims seeking 'payment for an amount in relation to the performance [or non-performance, if the claim is made by the principal against the contractor] by the [contractor/principal] of its obligations under the contract', with limited exceptions.

(c) Exceptions to 'construction work' are (essentially): construction of watercraft; drilling for oil or gas; constructing a shaft, pit or quarry for mining; fabricating or assembling items of plant used for extracting or processing oil or gas or minerals.

(d) The rationale for the system applies equally to all parts of the construction sector.

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 As outlined above, there is a concern that a homeowner's lack of knowledge regarding the stringent requirements of a security of payments legislation could be taken advantage of by a builder. Of particular concern is the homeowner's potential failure to recognise the consequence of receiving a payment claim.

25.2 ***Recommendation***

25.3 The Committee does not recommend the adjudication process under the Act be extended to include the domestic housing sector. Note however, the above differing view of the WA Committee.

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

26.1 The effect of security of payment legislation on small businesses differs largely between commercial and residential contracts. For a residential contract where the balance of power is relevantly even between a builder and a subcontractor or supplier, the security of payments legislation provides an effective tool for the recovery of payments (save for comments made above).

26.2 This is quite different for payment disputes arising out of a commercial contract. In this instance there is often a large imbalance of power between the head contractor and a small subcontractor or supplier. The small subcontractor/supplier can be reluctant to utilise its statutory rights for fear of losing work or losing the claim due to having inferior resources compared to that of the head contractor.

26.3 ***Recommendations***

26.4 The Committee makes no recommendation in relation to this issue.

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

27.1 ***Recommendations***

27.2 The Committee does not make a recommendation in relation to this issue.

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

28.1 It is unlikely that adjudicator fees deter applications from small parties. Ignorance of the system is the greatest deterrent.

28.2 ***Recommendations***

28.3 The Committee makes no recommendation in relation to this issue.

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

29.1 The Senate Committee's 22nd recommendation was that state and territory government departments and agencies responsible for administering their security of payment legislation closely scrutinise the practice of providing false statutory declarations and where necessary, launch prosecutions as a practical deterrent.[18]

29.2 The imbalance of power between head contractor and subcontractor is not unique to the construction industry. Where a subcontractor's enforcement of its statutory rights results in criminal charges against the head contractor for intimidation, there is a risk that the subcontractor will receive an unfair reputation and be denied further work from various other head contractors within the industry.

29.3 Such discrepancies in power are also dealt with by the Fair Work Commission between an employer and employee. In these instances a compulsory confidential conciliation is conducted prior to arbitration. Little or no formal evidence is required to be provided to the conciliator at this stage. If the matter is settled during the conciliation, the parties are

[18] Senate Economic References Committee (2015), *Insolvency in the Australian Construction Industry*, December 2015.

required to sign a settlement deed containing confidentiality provisions. These provisions ensure that the employee is able to search for further work without its future employer knowing that an Unfair Dismissal Application was ever filed.

29.4 A similar procedure may be appropriate for the construction industry where the parties can elect to go to a confidential conciliation after a payment claim and payment schedule have been served. The conciliation can be conducted over the phone and the matters kept confidential.

29.5 ***Recommendations***

29.6 The Committee is not convinced that the introduction of a new criminal offence to intimidate individuals who seek to rely on their rights under the Act a criminal offence will be effective in preventing this behaviour in practice.

29.7 The Committee suggests the Australian Building and Construction Commission is best placed to address the issue.