

## Chapter 8

### Security of payments legislation

8.1 As chapter 2 illustrated, a principal cause of insolvency in the construction industry is poor payment practices. Whether deliberate or forced, delayed payment by contractors up the contractual chain can have dire consequences for subcontractors further down that chain. It is imperative, therefore, that the legislative and regulatory framework ensures that money owed to subcontractors is paid in a timely manner.

8.2 The principle that should guide any legislative and regulatory framework in this area was neatly expounded by Mr Robert Couper, a subcontractor, at the Brisbane hearing. Mr Couper explained powerfully that '[s]ubcontractors engaged on the construction of [a] building [have] a rightful expectation of being paid for their work'.<sup>1</sup> This is not a new or radical insight and state parliaments have sought to reform the industry to ensure that money owed is paid. In particular, the committee was informed of two major reforms, one already legislated in every state and territory; and the other recently enacted in New South Wales and existing, in part, in Western Australia and the Northern Territory, and proposed in several other jurisdictions. They are, respectively: security of payments acts, and a mandatory statutory retention trust fund.

8.3 This chapter examines the current approach of security of payments legislation in Australia, while chapter 9 will address some of the major problems of this approach identified by submissions and witnesses. Chapter 10 will focus on retention trust funds. Before that, however, the committee will explore the link between effective security of payments protections and early warning signs of insolvency.

#### Early warning signs of insolvency

8.4 The committee heard that the clearest indicator that a business is in financial difficulty is its failure to pay money owed. In preventing insolvency events and illegal phoenix activity, regulators should take particular notice of companies that are not paying their employees or subcontractors on time—both wages and entitlements. Failure to do so may mean that companies in financial distress will continue to operate longer than they should, ensnaring more unwary individuals in their collapse.

8.5 Mr Robert Gaussen, Adjudicate Today, explained the link between failure to pay expeditiously, and insolvency events.

The best early warning system you can have is speedy applications made under the security of payment legislation. If people are not being paid and they are making their applications quickly, you identify the signs. They are out there on the public record.<sup>2</sup>

8.6 Mr. Dave Kirner, Assistant Secretary, CFMEU SA, agreed:

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1 *Official Committee Hansard*, 31 August 2015, p. 23.

2 *Official Committee Hansard*, 21 September 2015, p. 62.

I think the first sign that something is going wrong...is when the payments blow out. If it is a 14-day security-of-payment system with a stamp on it, and people still are not paying, and it becomes 30 days, 60 days or 120 days, and if you are doing a parcel of work and another contractor comes on to start completing that work as well, there is something going amiss.<sup>3</sup>

8.7 An early warning system is effective only if information flows freely to the regulators.<sup>4</sup> However, unfortunately, as will be examined in chapter 9, the regulators are often unaware of problems with payment.

### **Security of payments protections**

8.8 Since 1999, security of payment (SOP) legislation for the construction industry has been progressively introduced into all Australian jurisdictions. The purpose of this legislation is exemplified by the objects clause of the NSW Act, which provides:

The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.<sup>5</sup>

8.9 Although each state and territory has adopted a SOP Act, differences have emerged within each legislative regime. In particular, two models have developed—an 'East Coast' and a 'West Coast' model.

#### ***East Coast model***

8.10 The East Coast SOP model is based on NSW's *Building and Construction Industry (Security of Payment) Act 1999*. It has been replicated in Victoria,<sup>6</sup> Queensland,<sup>7</sup> Tasmania,<sup>8</sup> South Australia<sup>9</sup> and the Australian Capital Territory.<sup>10</sup> In general, the object of this model is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services. To achieve this objective, the SOP Acts have introduced new statutory rights for claimants, such as:

- a right to progress payments—even if the relevant contract is silent on this point;

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3 *Official Committee Hansard*, 21 September 2015, p. 32.

4 Mr Matthew Strassberg, Veda, *Proof Committee Hansard*, 28 September 2015, p. 3.

5 *Building and Construction Industry (Security of Payment) Act 1999* (NSW), s 3(1).

6 *Building and Construction Industry Security of Payment Act 2002* (Vic).

7 *Building and Construction Industry Payments Act 2004* (Qld).

8 *Building and Construction Industry Security of Payment Act 2009* (Tas).

9 *Building and Construction Industry (Security of Payment) Act 2009* (SA).

10 *Building and Construction Industry (Security of Payment) Act 2009* (ACT).

- a right to interest on late payments; and
- a right to suspend work.

8.11 The East Coast SOP Acts establish a system of rapid adjudication for the resolution of payment disputes involving building and construction work contracts. This adjudication is conducted by an independent adjudicator with relevant expertise. If the decision of the adjudicator is in whole, or in part, in favour of the applicant, the respondent is required to pay the specified amount directed by the adjudicator to the applicant. Decisions by the adjudicator are enforceable as a judgement debt.

8.12 The East Coast model aims to ensure that cash flows down the contractual chain. In doing so, the HIA argued that it 'effectively establishes a default entitlement to payment',<sup>11</sup> as there 'is little determination of a dispute on its merits or in a fair manner'.<sup>12</sup> Nevertheless, the HIA indicated that it believes on balance SOP Acts are beneficial.

In HIA's experience the SOP has provided an effective mechanism for payment for those subcontractors who have availed themselves of the laws. When used appropriately they can minimise the financial impact of a builder's collapse or insolvency on a subcontractor to current works in progress.<sup>13</sup>

8.13 Recent amendments in NSW have moderated the operation of the *Building and Construction Industry (Security of Payment) Act 1999* in important ways. A 2013 amendment aimed to ensure prompt payment for subcontractors.<sup>14</sup> It had three major changes. It:

- established prompt payment provisions;
- required a head contractor to give a principal a written statement that all subcontractors have been paid when making a claim for payment; and
- introduced new provisions to allow contractors to be fined or jailed for providing a false or misleading statement in order to get paid.

8.14 While positive in theory, some submissions to this inquiry pointed out problems in the amending Act.<sup>15</sup> In particular, Mr Andrew Wallace, a Queensland barrister who conducted a 2014 review of the Queensland SOP Act, considered that the requirement that a head contractor give the principal a written statement that all subcontractors have been paid when making a claim for payment 'is just crazy. It is putting the cart before the horse'.<sup>16</sup>

8.15 Mr Wallace explained that without receiving the payment owed by the principal, the head contractor would be unable to pay his subcontractors. This problem

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11 HIA, *Submission 7*, p. 5.

12 HIA, *Submission 7*, p. 6.

13 HIA, *Submission 7*, p. 6.

14 *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)

15 Robert Fenwick Elliott, *Submission 30*, pp. 1–5.

16 *Proof Committee Hansard*, 4 November 2015, p. 41.

was also identified by Justice Applegarth in a recent decision in the Supreme Court of Queensland.<sup>17</sup> Referring to this decision, Mr Wallace argued that this requirement 'will cause insolvency amongst subcontractors, not help them'.<sup>18</sup>

8.16 The CFMEU explained further that in NSW there is a longstanding statutory provision that ensures head contractors provide minimum levels of oversight and responsibility over the remuneration of all individuals on site.<sup>19</sup> Section 127 of the *Industrial Relations Act 1996* requires head contractors to obtain a written statement from subcontractors to the effect that the entitlements of the subcontractors' employees have been paid. In the absence of this statement, the head contractor may withhold payment to the subcontractor or will be held liable for any unpaid employee entitlements. The CFMEU noted:

A head contractor may not be aware of difficulties being experienced elsewhere by their subcontractors. However where a head contractor has received the benefit of the work of subcontractor employees it is only reasonable that they take some steps to monitor the payment of those employee entitlements and make good payments where they fail to do so.<sup>20</sup>

8.17 Unfortunately, this arrangement is not working in all circumstances. A subcontractor who wished to remain anonymous informed the committee of his experiences with such statements.

We are required to forward a Subcontractors Statement with all invoices to provide evidence that we have paid all remunerations to employees and I believe that builders also provide these types of statements to their clients before payments are made. What is the point of these statements if no-one checks to see if the statements are accurate. Maybe there should be more pressure put on the clients to check who is or isn't being paid on their projects. Especially Government and Government funded projects. It seems extremely unfair in some cases to see our tax dollars (when paid) spent on projects and then see ourselves providing free labour and materials when the builder becomes insolvent without paying us.<sup>21</sup>

8.18 The committee was also informed of significant recent amendments to the Queensland SOP Act. The *Building and Construction Industry Payment Amendment Act 2014* (Qld) had a number of major changes, including, among other changes:

- reforming the process of appointment of adjudicators;
- introducing a dual model for 'standard' and 'complex' payment claims; and
- amending the timeframe for making and responding to complex payment claims and adjudication applications.

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17 *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218, [16]–[34].

18 *Proof Committee Hansard*, 4 November 2015, p. 40.

19 CFMEU, *Submission 15*, p. 30.

20 CFMEU, *Submission 15*, p. 30.

21 Name withheld, *Submission 17*, p. 3.

8.19 The most significant amendment relates to the appointment of adjudicators. The previous Act required claimants apply for an adjudication of a payment claim through an Authorised Nominating Authority (ANA). The ANA then nominated an adjudicator to decide the claim. Under the Act, only claimants could decide the ANA with which they would lodge an adjudication application with. Mr Wallace considered that this process gave rise to an apprehension of bias and recommended restricting the power to appoint adjudicators to a new Adjudication Registry, operating under the state regulator—the QBCC.<sup>22</sup> The 2014 Amendment Act enacted this recommendation, abolishing all Queensland ANAs, whose functions were taken over by the Adjudication Registry. These amendments have proven controversial in Queensland, and will be addressed in more detail below.

### *West Coast model*

8.20 Western Australia<sup>23</sup> and the Northern Territory<sup>24</sup> employ a 'West Coast' model, based originally on the UK model. Although the purpose of both models is similar, the West Coast SOP model operates considerably differently. Adjunct Professor Philip Evans, University of Notre Dame Law School, explained that the model adopts a 'more simplistic approach that attempts not to interfere with the contractual rights and obligations of the parties to a construction contract'.<sup>25</sup> That is, rather than establish new statutory rights that override the contract, the West Coast model 'operates by reference to the parties' own contractual arrangements'.<sup>26</sup>

8.21 The objects of the Western Australian and Northern Territory Construction Contracts Acts are:

- to prohibit or modify certain provisions in construction contracts;
- to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts; and
- to provide a means for adjudicating payment disputes arising under construction contracts.

8.22 The principal differences between these two models are:

- the East Coast model prescribes a statutory payments scheme that is not only detailed but also overrides any inconsistent provisions. By contrast the West Coast model maintains the parties' contractual payment regimes to a large degree, rather than explicitly overriding them;

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22 *Final Report of the Review of the Discussion Paper—Payment Dispute Resolution in the Queensland Building and Construction Industry* (May 2013), p. 165, Recommendations 17 and 18.

23 *Construction Contracts Act 2004* (WA).

24 *Construction Contracts (Security of Payments) Act 2004* (NT).

25 *Proof Committee Hansard*, 26 October 2015, p. 1.

26 Society of Construction Law Australia, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (May 2014), p. 15.

- the East Coast model only permits statutory payment claims to be made up the contractual chain, which usually means a subcontractor making a payment claim against the head contractor. The West Coast model allows for payment claims to be made up and down the contractual chain;
- while both models allow for an adjudication scheme that determines payment claims as an immediate fast-track remedy, there are significant differences in terms of the provisions for adjudicator appointments, submissions which an adjudicator is permitted to consider and the way an adjudicator needs to adopt to arrive at their decision. The East Coast model is more restrictive in these aspects.

8.23 Both models render void 'pay-when-paid' clauses in construction contracts. These clauses condition the head contractor's liability to pay subcontractors on payment by the principal to the head contractor.

### ***Skipping up the contractual chain***

8.24 In some jurisdictions an alternative avenue exists for subcontractors to seek to obtain payment in circumstances where a contractor up the chain has defaulted.

8.25 In New South Wales, for example, under the *Contractors Debts Act 1997*, a subcontractor who has not been paid by a contractor can obtain payment directly from the principal. The recovery process starts with the subcontractor serving a notice of claim and a debt certificate on the principal contractor. That has the effect of assigning to the unpaid subcontractor the money owed by the principal to the defaulting head contractor. The principal must pay the amount owed to the unpaid subcontractor, to the extent that the funds in hand permit or lodge a defence against the notice of claim.<sup>27</sup>

8.26 The same general structure applies in Queensland under the *Subcontractor's Charges Act 1974* (Charges Act). The effect of making a claim under this Act is that a sum of money is taken out of circulation and charged for the benefit of the subcontractor. This puts the subcontractor in the position of a secured creditor.

8.27 The major disadvantage for subcontractors with the Queensland Act is its technical nature and strict time limits—in particular a subcontractor must choose either the Charges Act or the SOP Act. These limitations are, however, necessary to prevent a subcontractor from vexatiously destroying the cash flow of a builder at a critical time. This could occur if the flow of money from the principal to the head contractor was frozen under the Charges Act and simultaneously the head contractor was required to comply with an order to fast-track payments under the SOP Act.

8.28 Despite some challenges in implementation, the ability of subcontractors to bypass defaulting contractors is beneficial and should be considered by other states and territories.

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27 *Contractors Debts Act 1997* (NSW), s. 9.

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***Timelines under the Security of Payment Acts***

8.29 The delineation between 'East Coast' and 'West Coast' models shows important (and major) distinctions between each Act. The following three Tables (tables 8.1, 8.2, and 8.3) illustrate significant differences between each legislative regime when it comes to ensuring that money owed to subcontractors is paid. These differences highlight the fragmented nature of SOP legislation in Australia.

8.30 Under each SOP Act, a party to a construction contract who is entitled to a progress payment may serve a payment claim on a person who is liable to make that payment. However, as table 8.1 illustrates, the timeline under which an individual may serve a payment claim differs across jurisdictions. Additionally, the timeframe within which the person liable must pay the progress claim differs substantially; ranging from 10 business days in Queensland, Tasmania and the ACT, to 50 days in Western Australia.

**Table 8.1: Making a progress claim and entitlement to be paid under the SOP Acts**

<b>Jurisdiction</b>	<b>When may a payment claim be served?</b>	<b>When must a progress claim be paid?</b>
<b>NSW</b>	Up to 12 months after relevant construction work carried out. <sup>28</sup>	To subcontractor: 30 days after payment claim made. <sup>29</sup> To head contractor: 15 days. <sup>30</sup>
<b>Victoria</b>	Up to 3 months after relevant construction work carried out. <sup>31</sup>	Within 20 business days after construction work carried out. <sup>32</sup>
<b>Queensland</b>	Within 6 months after the relevant construction work carried out. <sup>33</sup>	10 business days after a payment claim is made. <sup>34</sup>
<b>South Australia</b>	Within 6 months after the relevant construction work carried out. <sup>35</sup>	15 days after a payment claim is made. <sup>36</sup>
<b>Tasmania</b>	Up to 12 months after relevant construction work carried out. <sup>37</sup>	10 days after a payment claim is made (for all construction work other than home building). <sup>38</sup>
<b>ACT</b>	Up to 12 months after relevant construction work carried out. <sup>39</sup>	10 days after a payment claim is made. <sup>40</sup>
<b>Western Australia</b>	Can be made any time after contractor has performed any of its obligations. <sup>41</sup>	50 days after construction work carried out. <sup>42</sup>
<b>Northern Territory</b>	Can be made any time after contractor has performed any of its obligations. <sup>43</sup>	28 days after construction work carried out. <sup>44</sup>

8.31 A person who is served with a progress claim has two options—he or she can either accept and pay the claim or dispute it, or aspects of it. In either case, the respondent must serve a payment schedule (under the East Coast model), or serve the claimant with a notice of dispute (under the West Coast model). The payment schedule and the notice of dispute must identify the amount of the payment (if any)

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

29 *Building and Construction Industry Security of Payment Act 1999* (NSW), s 10(1B).

30 *Building and Construction Industry Security of Payment Act 1999* (NSW), s 10(1A).

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

32 *Building and Construction Industry Security of Payment Act 2002* (Vic), s 9(2)(b).

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

34 *Building and Construction Industry Payments Act 2004* (Qld), s 15(1)(b).

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

36 *Building and Construction Industry Security of Payment Act 2009* (SA), s 11(1)(b).

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

38 *Building and Construction Industry Security of Payment Act 2009* (Tas), ss 15(2) and 19(3).

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

40 *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 13(1)(b).

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

42 *Construction Contracts Act 2004* (WA), s 10.

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

44 *Construction Contracts (Security of Payments) Act* (NT), s 13.



that the respondent proposes to make. Under the East Coast model, failure to serve a payment schedule within the prescribed timeframe means that the respondent becomes liable to pay the claimed amount in full on the due date for payment noted in table 8.1.

8.32 As table 8.2 below indicates, respondents generally must serve a payment schedule or notice of dispute within 14 business days. In Queensland, which has now adopted a two tier model, in some cases a payment schedule does not need to be served until 30 business days have elapsed.

**Table 8.2: Timeline for response to progress payment claim under the SOP Acts**

<b>Jurisdiction</b>	<b>When must a respondent serve a payment schedule (or give the claimant a notice of dispute)?</b>
<b>NSW</b>	Within 10 business days after the payment claim is served. <sup>45</sup>
<b>Victoria</b>	Within 10 business days after the payment claim is served. <sup>46</sup>
<b>Queensland</b>	For standard payment claim (under \$750,000): 10 business days after payment claim is served. <sup>47</sup> For complex payment claim (over \$750,000): (i) If claim served on respondent within 90 days after construction work completed, 15 business days after payment claim is served; <sup>48</sup> (ii) If claim served on respondent more than 90 days after construction work completed, 30 business days after payment claim is served. <sup>49</sup>
<b>South Australia</b>	Within 15 business days after the payment claim is served. <sup>50</sup>
<b>Tasmania</b>	For home building: 20 business days after payment claim is served; <sup>51</sup> For all other construction: 10 business days after payment claim is served. <sup>52</sup>
<b>ACT</b>	Within 10 business days after the payment claim is served. <sup>53</sup>
<b>Western Australia</b>	If respondent disputes claim must serve notice within 14 days and pay non-disputed part within 28 days. <sup>54</sup> If no dispute, respondent must pay within 28 days. <sup>55</sup>
<b>Northern Territory</b>	If respondent disputes claim must serve notice within 14 days and pay non-disputed part within 28 days. <sup>56</sup> If no dispute, respondent must pay within 28 days. <sup>57</sup>

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

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

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

48 *Building and Construction Industry Payments Act 2004* (Qld), s 18A(3)(b)(i).

49 *Building and Construction Industry Payments Act 2004* (Qld), s 18A(3)(b)(ii).

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

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

52 *Building and Construction Industry Security of Payment Act 2009* (Tas), s 19(3)(b).

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

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

55 *Construction Contracts Act 2004* (WA), s 17; Schedule 1, Div 5, cl. 8(3).

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

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

**Table 8.3: Adjudication timelines under the SOP Acts**

<b>Jurisdiction</b>	<b>Timeframe to apply for adjudication</b>	<b>Timeframe for response</b>	<b>Timeframe for adjudication decision</b>
<b>NSW</b>	10 or 20 business days after payment schedule or due date for payment passes depending on respondents action. <sup>58</sup>	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. <sup>59</sup>	Within 10 business days of notifying claimant and respondent of acceptance of application. <sup>60</sup>
<b>Victoria</b>	10 business days after claimant receives payment schedule; If no schedule, no later than 17 business days after due date passes. <sup>61</sup>	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. <sup>62</sup>	Within 10 business days of notifying claimant and respondent of acceptance of application; with claimants agreement longer—but no longer than 15 business days. <sup>63</sup>
<b>Queensland</b>	10 or 20 business days after payment schedule; due date for payment passes; or notice of intention given, depending on respondents action. <sup>64</sup>	For standard claim: within 10 business days of receiving application; or 7 business days of receiving notice of adjudicator's acceptance of application; <sup>65</sup> For complex claim: 15 and 12 business days respectively, <sup>66</sup> with option of extending by 15 business days. <sup>67</sup>	For standard claim: 10 business days after receiving respondent's response; For complex claim: 15 business days, <sup>68</sup>

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

59 *Building and Construction Industry Security of Payment Act 1999* (NSW), s 20(1).

60 *Building and Construction Industry Security of Payment Act 1999* (NSW), s 21(3).

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

62 *Building and Construction Industry Security of Payment Act 2002* (Vic), s 21(1).

63 *Building and Construction Industry Security of Payment Act 2002* (Vic), s 22(4).

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

65 *Building and Construction Industry Payments Act 2004* (Qld), s 24A(2).

66 *Building and Construction Industry Payments Act 2004* (Qld), s 24A(4).

67 *Building and Construction Industry Payments Act 2004* (Qld), s 25A(5).

68 *Building and Construction Industry Payments Act 2004* (Qld), s 24A(5).

<b>South Australia</b>	15 or 20 business days after payment schedule; due date for payment passes; or notice of intention given, depending on respondents action. <sup>69</sup>	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. <sup>70</sup>	Within 10 business days of respondent's response, or if no response—the date response is due. <sup>71</sup>
<b>Tasmania</b>	10 or 20 business days after payment schedule or due date for payment passes depending on respondents action. <sup>72</sup>	Within 10 business days after receiving copy of the application; or 5 business days after receiving notice of adjudicator's acceptance of the application. <sup>73</sup>	10 business days after receiving the respondent's response. <sup>74</sup>
<b>ACT</b>	10 or 20 business days after payment schedule or due date for payment passes depending on respondents action. <sup>75</sup>	Within 7 business days after receiving copy of the application; or 5 business days after receiving notice of adjudicator's acceptance of the application. <sup>76</sup>	10 business days after receiving the respondent's response. <sup>77</sup>
<b>Western Australia</b>	28 days after the dispute arises. <sup>78</sup>	14 days <sup>79</sup>	14 days from date of service of the response <sup>80</sup>
<b>Northern Territory</b>	Within 90 days after the dispute arises. <sup>81</sup>	Within 10 working days after being served. <sup>82</sup>	10 working days after receiving the respondent's response. <sup>83</sup>

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

70 *Building and Construction Industry Security of Payment Act 2009* (SA), s 20(1).

71 *Building and Construction Industry Security of Payment Act 2009* (SA), s 21(3).

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

73 *Building and Construction Industry Security of Payment Act 2009* (Tas), s 23(2).

74 *Building and Construction Industry Security of Payment Act 2009* (Tas), s 24(1).

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

76 *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 22(1).

77 *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 23(3)(a).

78 *Construction Contracts Act 2004* (WA), s 26.

79 *Construction Contracts Act 2004* (WA), s 27.

80 *Construction Contracts Act 2004* (WA), s 31(1).

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

82 *Construction Contracts (Security of Payments) Act* (NT), s 29(1).

83 *Construction Contracts (Security of Payments) Act* (NT), s 33(3).

8.33 A major distinction between the East Coast and West Coast models relates to adjudication. Under the East Coast model, only a claimant can apply to have a 'payment claim' adjudicated, whereas under the West Coast model, any party to the claim can have a 'payment dispute' adjudicated.

8.34 In any case, as table 8.3 demonstrates, adjudication under both models is designed to be rapid. Generally speaking under the East Coast models, a claimant has either 10 or 20 business days to apply for adjudication (depending on whether a payment schedule was served, and whether the claimant is required to give additional notice of their intention to seek adjudication). The respondent has between 2 and 10 days in most jurisdictions to reply, and the adjudicator must make their decision within 10 to 15 business days.

8.35 Under the West Coast model, either party to the dispute may apply for adjudication. In the Northern Territory, the period is 90 days. In Western Australia, a party must do so within 28 days after the dispute arises. If no party applies by then, adjudication is precluded. The effect of these cut-off periods will be addressed in the following chapter.

### *Are the Security of Payment Acts working effectively?*

8.36 The committee heard that—where utilised—the SOP Acts have been successful in ensuring that money owed to subcontractors is paid. The 'secret of the success' of these acts are the confluence of a number of factors such that the process is 'quick, efficient, cheap, effective and fair'.<sup>84</sup>

8.37 Adjunct Professor Philip Evans, who was commissioned by the Western Australian Minister for Commerce to review the effectiveness of the WA SOP Act, considered that 'there is no doubt' that the Act 'had made a significant impact on keeping the money flowing in the construction industry'.<sup>85</sup> In Professor Evans' opinion, however, the 'problem is that [the Act] seems to be underutilised by the lower level of the contracting chain'.<sup>86</sup>

8.38 In South Australia, witnesses informed the committee that while 'the Act still needs time to bed down',<sup>87</sup> having only been introduced in 2009, 'it is effective if used'.<sup>88</sup> Mr Edward Sain, a construction industry consultant, agreed but noted that problems do exist: 'the Security of Payment Act is a damn good one if it is managed properly'.<sup>89</sup>

8.39 In the Australian Capital Territory, the security of payments regime has also only been in force for a relatively short period—since 2010. Although beneficial, it

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84 *Official Committee Hansard*, 21 September 2015, p. 58.

85 *Proof Committee Hansard*, 26 October 2015, pp. 1–2.

86 *Proof Committee Hansard*, 26 October 2015, p. 2.

87 Mr John Chapman, South Australian Small Business Commissioner, *Official Committee Hansard*, 21 September 2015, p. 7.

88 Mr Christopher Rankin, Executive Director, AMCA, *Official Committee Hansard*, 21 September 2015, p. 12.

89 *Official Committee Hansard*, 21 September 2015, p. 47.

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similarly appears underutilised with an average of 'fewer than 60 claims' resolved under the scheme each year.<sup>90</sup>

8.40 Mr Chesterman, QBCC, considered that the SOP Act was working effectively in Queensland. He informed the committee that under the Queensland SOP Act in the 2014–2015 financial year, 'a total of 700 adjudication applications were lodged, resulting in enforceable decisions being released where claimants, in total, were awarded three-quarters of a billion dollars'.<sup>91</sup>

8.41 Mr Wallace agreed with Mr Chesterman. Mr Wallace argued that the Queensland SOP Act 'has proven itself invaluable for thousands of contracted parties in Queensland,' assisting them to recover 'hundreds of millions of dollars since 2004, moneys that may never have been otherwise recovered'.<sup>92</sup> Mr Wallace continued:

When I prepared my report, I noted that to the end of financial year 2012 the total value of adjudicated amounts was some \$616½ million. I have been out of the loop since I prepared my report, which is dated May 2013, but I understand from the registry that in the two years that have followed, from the inception of the act to the current day, there have been almost \$2 billion worth of moneys paid or adjudicated amounts.<sup>93</sup>

8.42 Nevertheless, Mr Wallace explained to the committee that the SOP Acts 'do not provide security of payment at all', because 'even if you get a judgment from a court, that does not secure payment' in 100 per cent of cases.<sup>94</sup> Mr Wallace noted that any Act that deals with payment disputes in the construction industry 'will never be perfect' and no one Act will be the 'panacea for all of the many payment problems encountered in the building and construction industry'.<sup>95</sup> This is worth bearing in mind as the following chapter examines some of the problems identified with the current approach to SOP legislation in Australia.

### ***Committee's views***

8.43 The committee considers that the establishment of security of payments protections across Australia has been a positive development. However, the disparate nature of the various regimes and the relatively poor take up of parties enforcement rights under the State and Territory regimes, as well as other significant problems addressed in chapter 9, provides a strong indication that national harmonisation is necessary.

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90 Environment and Planning Directorate, *Improving the ACT Building Regulatory System: Discussion Paper* (November 2015), p. 27.

91 *Official Committee Hansard*, 31 August 2015, p. 33.

92 *Proof Committee Hansard*, 4 November 2015, p. 35.

93 *Proof Committee Hansard*, 4 November 2015, p. 35.

94 *Proof Committee Hansard*, 4 November 2015, p. 35.

95 *Proof Committee Hansard*, 4 November 2015, p. 35.

