Monetary value as a proxy for vulnerability in statutory adjudication and other construction regulation

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Abstract

By and large, statutory intervention into contracts for construction projects is limited to circumstances in which it is perceived by the legislature that one party is likely to be vulnerable to the other, and that this vulnerability is such that it is appropriate to constrain the parties' freedom to contract as they wish.

It is in the nature of such legislation that inevitably it will be a somewhat blunt instrument for reforming parties' commercial behaviour, applying as it must to firms and individuals which are *deemed* to be so vulnerable, regardless of whether they are *in fact* vulnerable.

This paper examines the use in statutes of monetary value – whether of the contract price, of claims or otherwise – as a means of determining such vulnerability. It focuses in particular upon whether any particular value has been – or should be – viewed as an appropriate proxy for such vulnerability.

The paper reviews the current situation in Australia in respect of two key areas of construction activity where the legislature has seen fit to intervene into parties' freedom to contract on the grounds of protection of the vulnerable: the residential building sector (protection of owners as consumers) and security of payment (protection of subcontractors and suppliers). The latter is investigated in the context of recent proposals towards harmonisation of the various state-based legislation in Australia and, in particular, Jeremy Coggins's suggestion that a dual system for regulation apply depending upon the monetary value of the claim.

It is concluded that, despite the inevitably somewhat arbitrary nature of nomination of a monetary value, it remains an essential element to any statutory test for vulnerability. This both supports the viability of a monetary trigger as an element within a harmonised model for Australian security of payment legislation (which of itself might be considered in other countries where similar legislation is in place) and invites further research into whether it is possible to nominate an optimal value for statutory intervention in respect of construction industry regulation.

Keywords: legislation, consumer protection, security of payment, statutory adjudication, construction industry.

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1. Introduction

Construction law has been described by Bruner (2007: 13-14) as “a primordial soup in the ‘melting pot’ of the law”. Perhaps the primary reason that such a description is apt is because the law – at its heart, a system of regulation which seeks to offer predictability of outcomes to parties subject to it – is applied in the construction sphere to an industry and to practices which display almost infinite permutations throughout the world and over time.

Drafters of standard forms of building contract, or of statutes applying to the industry, need to anticipate those permutations when devising schemes which intervene into construction participants’ freedom otherwise to behave as they think fit (provided, of course, that they comply with generally-applicable laws). These drafters seek to identify, in the abstract at the time of drafting, parties whose behaviour needs to be regulated or upon whom protections are to be conferred: that is, despite the drafter not having the *actual* party in their contemplation, the scheme they devise will *deem* parties displaying certain characteristics to fall within its bailiwick.

In turn, a statute which prescribes, for example, that parties are unable to include certain matters in their contract – or, on the other hand, that they *must* include certain things – will need to incorporate a mechanism which determines the types of arrangements will be subject to that scheme. A typical approach for these mechanisms is to identify the arrangements by reference to the type of work being undertaken and its monetary value. For example, under the *Domestic Building Contracts Act 1995* (Vic), a statute of the state of Victoria, Australia, contracting arrangements are captured by the legislative scheme if they are for “domestic building work” (essentially, that in relation to a home) and the greatest level of intervention is applied to arrangements where the contract price exceeds A$5,000.

This paper examines the nature and content of these mechanisms. It seeks, in particular, to identify whether it is possible to propose an optimal basis for intervention into the parties’ contracting arrangements where one of the parties is identified as being “vulnerable” to the other in the sense that it is unable reasonably to protect its interests through negotiation of appropriate terms in the contract. It does so via the following structure:

- In section 2, undertaking a survey of mechanisms currently used for legislative intervention in construction contracts, focusing upon the approaches to residential building across the Australian states and territories; this reveals a lack of uniformity despite these statutes broadly seeking to “crack the same nut” in a policy sense – that is, protection of those who are deemed unable to protect themselves via the contract; it is noted, moreover, that there is little evidence to show that the drafters applied meaningful objective criteria to establishing the nexus between vulnerability and protection;

- In section 3, examining an area of legislative intervention where there was in fact detailed consideration given to the basis on which that nexus would be applied, with the result that the monetary value was retained as a limb of the test: the definition of “consumer” under the *Australian Consumer Law* (***ACL***); and

- In section 4, considering whether the approach applied in relation to the *ACL* may usefully be applied to construction industry regulation, especially in the context of recent proposals to harmonise the "security of payment"[2] legislation in place across the Australian states and territories and, especially, Jeremy Coggins's proposal (2011, 2012) that a dual system for regulation apply depending upon the monetary value of the claim.[3]

We conclude that, despite the inevitably somewhat arbitrary nature of nomination of a monetary value, it remains an essential element to any statutory test for vulnerability. This both supports the viability of a monetary trigger as an element within a harmonised model for Australian security of payment legislation (which might be considered in other countries where similar legislation is in place),[4] and invites further research into whether it is possible to nominate an optimal value for statutory intervention in construction industry regulation.

Whilst this investigation is limited in its scope and therefore its conclusions, it is undertaken in the context of little previous research having been done in the area and therefore seeking to prompt further research and debate amongst the international construction community.

2. Mechanisms for legislative intervention

The stated purposes of the *Domestic Building Contracts Act 2000* of the state of Queensland include achieving "a reasonable balance between the interests of building contractors and building owners" (s 3(a)). Legislation with similar aims is also in place across the seven other states and territories of Australia.[5] The legislation operates in varying ways across Australia, but features which apply across most jurisdictions include the prescription of matters which contracts for residential work must, or must not, include. These are explicitly designed to redress the disadvantage in relation to bargaining power, disparity of knowledge and lack of

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[2] This paper adopts "security of payment" as the prevailing generic term for legislation in Australia which seeks to regulate payment processes, and disputes, in order to facilitate cashflow within the contracting chain. This encompasses the "adjudication" element which represents the accepted terminology for similar legislation in the UK, New Zealand and elsewhere.

[3] Having said that, this paper does not seek to engage directly with whether it is monetary value or the types of claim which provides the most appropriate differentiator for the application of the dual scheme. Essentially, as is noted in section 4, Coggins's proposal rests upon monetary value as a proxy for vulnerability – hence, the attention paid to it in this paper. On the other hand, Brand and Davenport (2011 but see also the previous articles by the authors referred to in that paper) have cogently argued that the intent and policy objectives of the Australian security of payment legislation would more appropriately be promoted if the distinction was between "progress claims" – which would be processed under the "Defined Scheme" (currently reflected under what they term the "Australian model", which is referred to as the "East Coast model" in section 4 below) – and more generalized "money claims", which would be resolved under the West Coast model. See, further, n 26 below.

[4] See the list in Coggins and Donohoe (2012: 196-7) and the discussion by Brand and Davenport (2011: 256-8).

[5] See, primarily, *Building Act 2004* (ACT), *Home Building Act 1989* (NSW), *Building Act 2005* (NT), *Domestic Building Contracts Act* 2000 (Qld), *Building Work Contractors Act 1995* (SA), *Housing Indemnity Act 1992* (Tas), *Domestic Building Contracts Act 1995* (Vic), *Home Building Contracts Act 1991* (WA). For a recent consideration of the Australian (and New Zealand) residential building legislation see Britton (2013: 17-21).

understanding of contractual principles which home owners, as a class, are perceived to suffer vis à vis builders.[6] For example, warranties as to standards of workmanship and materials are implied into contracts on a basis that cannot be excluded by the parties,[7] and "cooling off" periods are provided for (within which the owner may end the contract after signing it in certain circumstances).[8]

Having said that, there is little uniformity of approach across the various states and territories. This is especially the case when it comes to the trigger for application of these prescriptive aspects of the Acts. Whilst these triggers are by way of a combination of the type of work being undertaken and the value of the contract under which it is undertaken, both elements vary significantly across the country. By way of example, Table 1 illustrates the variation in respect of the minimum contract value to which the provisions apply.

Table 1: Contract values as trigger for application of residential building legislation

State/ Territory	Relevant legislation	Contract value A$
Australian Capital Territory	*Building Act 2004* (ACT) (see rule 27 Building (General) Regulation 2008 (ACT))	12,000
New South Wales	*Home Building Act 1989* (NSW) s 7AAA	5,000
Northern Territory	*Building Act 2005* (NT) (see rules 41J and 41E Building Regulation (NT)	12,000
Queensland	*Domestic Building Contracts Act 2000* (Qld) s 9	3,300
South Australia	*Building Work Contracts Act 1995* (SA) s 27(2)	12,000
Tasmania	*Housing Indemnity Act 1992* (Tas) s 5	12,000
Victoria	*Domestic Building Contracts Act 1995* (Vic) ss 29-43 and definition of "major domestic building contract"	5,000
Western Australia	*Home Building Contracts Act 1991* (WA) s 3(1)	7,500

This type of disparity in legislative approach is to a certain extent an expected and inevitable result of a federal structure such as that in place in Australia where the former colonies (now States) retain legislative power over matters (in this case, residential building work) which have not been ceded to the central government. However, in a relatively small country like Australia (at least, in terms of population and the size of the construction industry), such

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[6] Explanatory memorandum, Queensland Domestic Building Contracts Bill 1999; Victoria, *Parliamentary Debates,* Legislative Assembly, 14 November 1995, 1140 (Mrs Wade).

[7] See, eg, *Domestic Building Contracts Act 1995* (Vic) ss 8, 20, 132.

[8] See, eg, *Domestic Building Contracts Act 1995* (Vic) s 31.

differences across state borders may be expected to hamper the efficiency of commerce or, at the very least, to cause confusion to builders and consumers alike.[9]

As was noted at the outset, this paper seeks to identify whether any particular monetary value might provide an optimal trigger for the imposition of provisions designed to protect vulnerable parties. As a first step, however, the figures cited above are of relatively little value to this task, not simply because of their level of disparity but also there is scant evidence available as to why these figures were chosen by the various legislatures. None of the supporting documentation produced by Australia's Parliaments – primarily, explanatory memoranda and second reading speeches – provides a clear explanation or methodology for adopting these values. In turn, it is difficult to resist the inference that the trigger points have been framed in a somewhat arbitrary fashion.

3. Approach taken in the *Australian Consumer Law*

Whilst little evidence exists as to the basis on which contract values have been prescribed under the Australian residential building legislation, there is greater guidance available in respect of the regulation of consumer protection generally under the *Australian Consumer Law* (***ACL***).[10] This is Commonwealth (federal) legislation which largely replaces, by dint of agreement with the states and territories, the patchwork which existed until 2011 comprising the *Trade Practices Act 1974* (Cth) and various state-level laws.

The following section examines the process by which an element of the *ACL* akin to the residential building legislation was drafted in 2010. This seeks to illustrate that, whilst stipulating a monetary value as a proxy for vulnerability inevitably tends towards arbitrariness, it is a fraught exercise to frame a proxy which does not include such a value. Similarly to the residential building legislation, the *ACL* prescribes certain implied conditions and warranties, in this case in arrangements for the supply of goods and services. The conditions imposed on suppliers include providing adequate descriptions of goods,[11] and ensuring that the goods are of merchantable quality[12] and reasonably fit for their purpose.[13]

The application of the relevant provisions rests upon a definition of "consumer" in s 3 of the ACL. This is a complicated definition with a number of applicable further provisions and qualifications, but in essence it provides that a person acquires goods or services "as a consumer" if and only if the price paid or payable for them does not exceed A$40,000 *or* they are of a kind "ordinarily acquired for personal, domestic or household use or consumption". The "or" is significant here: it effectively means that the "ordinarily acquired…" limb only has

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[9] For a discussion of the impact of such disparity in the context of security of payment legislation, see, eg, Coggins, Fenwick Elliott and Bell (2010: 19-20).

[10] The *ACL* is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

[11] *ACL* s 70.

[12] *ACL* s 71(1).

[13] *ACL* s 71(2).

relevance to goods the value of which exceeds A$40,000. In turn, purchasers of goods with a value of less than A$40,000 are (subject to the applicable qualifications) *deemed* to be worthy of the provisions' protection regardless of the actual nature of the transaction.

This dual approach was and remains controversial. When the monetary trigger (then, A$15,000) was first enacted under the *Trade Practices Act 1974* (Cth) (***TPA***), the Parliamentary committee acknowledged the arbitrary nature of adopting such a threshold but felt that allowing the figure to be altered by regulation addressed the concern (Griggs et al (2011): 63). However, when the time came to draft the revised version of the *TPA* which was to become the *ACL*, the Senate Standing Committee on Economics strongly advocated for the removal of the monetary threshold, and the Bills as prepared did not include it. The Committee (2010: [3.42]) noted that "[i]t has long been recognised that the monetary threshold is arbitrary and contentious. It is anomalous that a business should have the same protection as an individual consumer if they buy goods for less than $40,000".

Despite this, the monetary threshold limb was reintroduced at the last minute. The Committee received submissions by various stakeholders proposing that the removal of the monetary ceiling would reduce consumer protection because, for example, goods that were purchased by small businesses for the use of employees (as "consumers") would not meet the "personal, domestic or household" criterion.

4. Use of a monetary proxy in legislation regulating construction

4.1 The challenge

The previous section sought to illustrate, by reference to the experience under the *ACL*, that attempting to define vulnerability within a statute in the absence of a monetary threshold is a fraught exercise. This is arguably even more acutely the case when it is the construction industry which is being regulated by the statute. The diverse range of multidisciplinary activities, the complex relationships that exist between parties and the commercial sophistication of participants in the industry makes the appropriate framing of a "purpose" or "nature" test of universal application an extremely difficult task.

In the context of the *ACL*, Griggs et al (2011: 77) have rightly called for further work to be done in pursuit of a unifying definition of "consumer", but have emphasised that such a quarry has thus far proved elusive. In the absence of such a definition, it is our view that a legislative scheme which combines the necessary element of defining the scope of the activity which is covered (for example, residential building work) with a monetary threshold as a proxy for vulnerability remains the most viable approach.

A monetary trigger has the key benefit of promoting certainty for parties – whether they be home owners, subcontractors or developers or the myriad other participants in the construction industry – albeit at the inevitable expense that the exact threshold chosen will be a somewhat "blunt instrument". Moreover, it arguably provides the most realistic reflection of the way in which consumers decide whether to enter into contracts: Paterson (2009: 953) has summarised a number of relevant studies by noting that, being unable to process large

amounts of information, consumers tend to focus on key items within the contract, price being prominent amongst these.

4.2 Australian "security of payment" legislation

If it is accepted that some sort of monetary threshold is a necessary element in the test for vulnerability which is worthy of legislative intervention, the next key question is what the appropriate amount should be for that trigger. This is very much a live question in the context of proposals to harmonise Australia's "security of payment" Acts – legislation which seeks, to varying degrees, to regulate project payment streams.

Over the past 14 years, security of payment legislation has been progressively passed in every Australian state and territory based upon the adjudication provisions of the UK *Housing Grants, Construction and Regeneration Act 1996* to a greater or lesser extent.[14] There are essentially two models in place in Australia: the so-called "West Coast" model incorporating the Western Australian and Northern Territory Acts and the "East Coast" model represented by the other states and territories' Acts.

As characterised by Speranza (2011: 172), the West Coast model is generally less prescriptive as to what can, and cannot, be included in the contract than the East Coast model and therefore intervenes less into parties' freedom to contract. Coggins and Donohoe (2012: 199) and Brand and Davenport (2011: 259) also note that, whereas the East Coast model is intended only to apply to matters arising directly out of the payment claim, adjudications under the West Coast model cover (like the original UK Act) disputes under the contract generally. However, as has been remarked upon by commentators including Brand and Davenport (2011: 259), "mission drift" has extended the ambit of claims under the East Coast model so that they routinely include substantial amounts generated by matters outside of the payment stream.[15]

As has been pointed out by Bell and Vella (2010: 567-8) and Coggins (2011: 36-7), whilst the specific aim of the legislation was to protect vulnerable participants in the supply chain by "stamp[ing] out the unAustralian practice of not paying contractors for work they

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[14] *Building and Construction Industry Security of Payment Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry Payment Act 2004* (Qld); *Building and Construction Industry Security of Payment Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Construction Contracts Act 2004* (WA). These Acts are referred to in this paper respectively as the "ACT Act", "NSW Act" and so forth, and collectively as the "SOP Acts". A comprehensive bibliography in relation to them is provided by Collins (2013: 374-430).

[15] For example, in *John Holland Pty Ltd v Walz Marine Services Pty Ltd* (2012) 28 BCL 62, the subcontractor submitted a claim under the Queensland Act for A$2.26 million in delay and disruption costs (albeit "styled [as] variations": [5]). Similar examples are cited by Coggins and Donohoe (2012: 216).

undertake on construction",[16] it was clearly the case that the legislation was also intended to reform behaviours across affected sectors of the industry.[17] This aim was sought to be achieved via provisions including prohibition of "paid when paid" clauses,[18] granting a default right to progress payment if no such agreement exists,[19] requiring prior notice for withholding payments,[20] establishing the right to suspend performance of contractual obligations for non-payment[21] and the right to refer disputes to fast-track adjudication.[22]

4.3 Further reform in 2013?

In early 2013, the Inquiry led by Bruce Collins QC into construction industry insolvency in New South Wales observed that, despite the legislative reforms, there has been little overall improvement in the cashflow outcomes for subcontractors. For example, he found (2013: 54) that more than A$1 billion was owed to subcontractors in NSW as a result of recent insolvencies during the 2011 financial year. The Report also confirms (2013: 61-64; 99-101) that inequality of bargaining power remains a root cause of the ongoing "subbie squeeze". In turn, Collins has recommended a "thorough review" of the NSW Act (2013: 74) with a suite of specific reforms proposed including expansion of the matters which an adjudicator can review (recommendation 39), the setting of maximum periods for payment after certification (recommendations 24, 29, 34 and 35) and removal of the requirement that parties "opt-in" to the operation of the Act via payment claims (recommendation 38).

Whilst these changes might well be expected to increase the likelihood that a subcontractor could take advantage of the Act's procedures, they do not directly address the issue that is the focus of this paper and discussed in detail in the next section: that the legislation does not allow for a qualitative assessment as to the vulnerability of the individual party before its potentially far-reaching interventions into the parties' freedom otherwise to contract as they see fit are triggered.

4.4 Lack of a specific vulnerability test

The apparent intent to reform the culture of the industry, enshrined most strongly in the East Coast model through its more prescriptive intervention into contracts, is reflected by the

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[16] Morris Iemma MP, Second Reading Speech for the Building and Construction Industry Security of Payment Bill, NSW Legislative Assembly, 29 June 1999 (*Hansard* p 11). Similarly, Collins (2013: 14) has more recently identified, as one of the two pillars on which his Report into construction insolvency rests, that '"it is against the good conscience of the community… to stand by and tolerate… a repeatedly demonstrated inability of the existing legal system to protect subcontractors against the default and the financial mismanagement of [head contractors]."

[17] Certain sectors and activities are excluded: see Coggins, Fenwick Elliott and Bell (2010: 16-19).

[18] See, eg, NSW Act s 12; WA Act s 9.

[19] See, eg, NSW Act s 8; WA Act s 15.

[20] NSW Act s 14; WA Act s 17.

[21] NSW Act ss 15, 24; WA Act s 42.

[22] NSW Act s 17; WA Act s 25.

legislation being deemed to apply to all arrangements within affected sectors without reference to the value of the arrangement (except in Victoria and potentially in Queensland, as discussed below).

Thus, there is no test for application which relates to the vulnerability of specific parties. Rather, the East Coast model essentially provides (see, eg, the description by Speranza (2011: 171-2)) that, where a supplier of work or services captured by the Act chooses to "opt-in" to the use of the Act, they endorse their payment claim as prescribed and the Act's provisions relating to the payment stream and adjudication then apply. As has been noted by Bell and Vella (2010: 570-2), the potential effect of this is to reverse the bargaining position which traditionally applied in the contracting chain: instead of those who do the work having to wait to get paid, those for whom the work is done must "pay now and argue later".

It has for many years been recognised in Australia, the UK and other places where no vulnerability-based element applies, that the legislation is being used by well-resourced and arguably non-vulnerable parties to make substantial claims by way of "ambush". The deliberately short time-frames[23] leave little opportunity for a respondent (the party from whom payment is claimed) to put forward a fully-considered case.

This limitation on respondents' rights, along with others embedded in the East Coast model, has led Coggins to propose (2011: 43) that the model tends inherently to the denial of procedural justice (this may, however, not be unintended given that the East Coast model is essentially a certification review process: Coggins and Donohoe (2012): 213) and therefore leads to the "disconcerting" result that "multi-million dollar progress claim disputes are being resolved, albeit on an interim basis, by means of a fast track adjudication scheme which limits the adjudicator's power to investigate and potentially bars a respondent from having its arguments heard by the adjudicator."[24]

4.5 Victorian approach: distinction based on contract value

In Victoria, however, elements of the scheme limit its application by reference to the type of claims and the value of the contracts. Provisions which currently are unique to the Victorian *Building and Construction Industry Security of Payment Act 2002* (Vic), introduced in 2006, seek to limit the use of the Act's provisions regulating payment (including expedited adjudication) to "pure" payment claims. Thus, "excluded amounts" such as in respect of latent conditions, claims for damages and delay-related claims, cannot be included in payment claims under the Act (see ss 10A-10B) and only certain types of non-agreed variations can be included.

The mechanism for deciding which variations can be included in payment claims under the Act depends upon the value of the contract, with the legislation essentially nominating three contract value-based thresholds. If it is below A$150,000, non-agreed variations of any

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[23] Generally, a matter of 5-8 weeks: see Bell and Vella (2010: 569) and Coggins (2011: 49).
[24] Coggins (2011: 43). See n 15 for examples of these claims.

amount may be included; if between A$150,000 and $5,000,000, 10% of the contract value can be claimed by way of non-agreed variations; and if it exceeds A$5,000,000 and the contract includes a dispute resolution clause, no non-agreed variations may be claimed.

The Second Reading speech for the amending Act gave little guidance as to the detailed policy underpinning this regime, but confirmed that the aim of placing a maximum cap was to ensure that the smaller value contracting sector and the subcontracting sector would be subject to the scheme, while larger contracts would be exempt from it.

The Victorian approach seems unnecessarily complex, especially through its incorporation of three categories rather than the single point of distinction (between parties which are vulnerable and those which are not) favoured by this paper. Nonetheless, it explicitly addresses the "mission drift" referred to above by limiting the types of claims which can be funnelled through the Act to those relating directly to the payment stream and, more generally, narrows the scope of application of the Act as the value of the contract increases. In turn, parties regarded as not being vulnerable in the relevant sense – and, therefore, falling outside the legislative scheme – retain the freedom to stipulate their own means of resolving payment-related disputes under the contract.

In December 2012, the *Discussion Paper* released by the Queensland Government outlined the Victorian approach (at pp 15-16) and sought submissions from stakeholders as to whether the types of payment claims under the Queensland Act's jurisdiction should be restricted in a similar manner or otherwise (including by reference to the contract price).

4.6 Dual scheme approach to harmonisation

The unique provisions in Victoria are but a more prominent example of a raft of differences which exist between the various Australian SOP Acts, and even within the two main models' Acts. Many commentaries on these differences have been written[25] but, generally speaking, the Acts vary significantly in relation to policy, procedure, terminology and physical layout. The potential impact on commerce having been recognised, attention has turned in recent years to models which could prove viable by way of a harmonised scheme across Australia.

Coggins (see, especially, 2010, 2011 and 2012) has proposed a "hybrid" adjudication scheme which utilises either the East Coast or West Coast models depending on the amount of the payment claim. In doing so, the proposal seeks to address both of the twin problems referred to above: lack of uniformity across jurisdictions and the expedited process being used inappropriately by those who arguably are not vulnerable.[26] Essentially, according to

[25] See, eg, Bell and Vella (2010), Coggins, Fenwick Elliott and Bell (2010), Brand and Davenport (2011) and Coggins and Donohoe (2012).

[26] As is discussed above (see n 3), Brand and Davenport (2011) have proposed a dual scheme model the distinction for which rests upon the type, rather than monetary value, of the claim. The model is attractive as a potential cure to the lack of harmonization of Australian security of payment legislation, especially because it arguably offers a closer alignment with the key policy driver of the legislation – promoting cashflow – than is currently achieved in the various Acts. The proposal is not, however, considered in detail in this paper given the focus here upon monetary value as a proxy.

Coggins's proposal, the "regulatory" East Coast model would be used for small purely progress payments below the threshold value of $25,000 and any other claims – whether above this value or under it but incorporating matters outside payment for work undertaken – would be determined using the West Coast model's "evaluative" process.

Coggins chose the $25,000 figure as covering a substantial proportion of the subcontractors in the lower end of the hierarchical chain, based upon a study (see 2011: 360) comparing the adjudication claim values between Queensland and Western Australia during the period 2008-2009. According to the comparison, 52% of the claims in Queensland and 30% of the claims in WA were below the value of $25,000.

5. Where do we go from here?

Ultimately, any legislative scheme which seeks to intervene into contracting arrangements to protect parties seen as vulnerable needs to strike a balance between such protection and the maintenance of certainty within the contracting community. The Coggins "hybrid" proposal goes a significant distance towards achieving such a balance in respect of security of payment, thanks largely to its incorporation of a monetary trigger. This is, however, a feature which, as noted above, is currently absent from the various Australian Acts (with the exception, in relation to variations, of Victoria).

Having said that, the A$25,000 threshold for payment claims proposed as part of the scheme inevitably may be viewed as somewhat arbitrary. Thus, in the context of security of payment legislation and other areas of construction regulation, the challenge remains to find a principled basis on which an optimal – or, at least, defensible – mark can be framed. We think that this question ought be the focus of further, detailed research, both as to the appropriate principle and, ultimately, the monetary threshold chosen.

We also suggest that the following observation from John Akehurst, then Managing Director of Woodside Petroleum Ltd, might provide guidance in striking the right balance:

> "For truly successful companies, the traditional master-servant relationship of project owner and project contractor is becoming obsolete. We have learnt that by sharing the risks, we share the rewards." (Australian Constructors Association (1999: 3))

It reminds us to be wary of blanket legislative intervention across an industry – including in its highly sophisticated and experienced sectors – where the aim is to protect those who are vulnerable due to an imbalance in bargaining power or information asymmetry.

The exercise is, however, worth embarking upon. Figures cited by Brand and Davenport (2011: 254) indicate that nearly a million people – well over 5% of the country's adult population – are employed in construction businesses in Australia and that the vast majority of trade service businesses have relatively small turnover, with income of less than A$100,000. It is the contention of this paper that an appropriately-framed monetary threshold can provide an umbrella of protection to these thousands of businesses whilst addressing the concerns of the large and sophisticated, but relatively few, non-vulnerable entities in the industry that their freedom to contract with like entities not be unnecessarily curtailed.

References

Bell M and Vella D (2010) “From motley patchwork to security blanket: The challenge of national uniformity in Australian ‘security of payment’ legislation”, *Australian Law Journal* **84**: 565-582.

Brand M C and Davenport P (2011) “Proposal for a ‘Dual Scheme’ model of statutory adjudication for the Australian building and construction industry”, *International Journal of Law in the Built Environment* **3**: 252-268.

Britton P (2013) “‘Make the Developer get the Job Right’: Remedies for Defects in Residential Construction”, *Society of Construction Law Paper D154.*

Bruner P (2007) “The Historical Emergence of Construction Law”, *William Mitchell Law Review* **34**: 1-24.

Coggins J (2011) “From disparity to harmonisation of construction industry payment legislation in Australia: A proposal for a dual process of adjudication based upon size of progress payment claim”, *Australasian Journal of Construction Economics and Building* **11(2)**: 34-59.

Coggins J, Fenwick Elliott R and Bell M (2010) “Towards harmonisation of construction industry payment legislation: a consideration of the success afforded by the East and West Coast models in Australia”, *Australasian Journal of Construction Economics and Building* **10(3)**: 14-35.

Coggins J and Donohoe S (2012) “A Comparative Review of International Construction Industry Payment Legislation, and Observations from the Australian Experience” *International Construction Law Review* **29**: 195-230.

Collins B (2013) *Final Report of the Independent Inquiry into Construction Industry in NSW*, Sydney, NSW Government.

Department of Treasury and Finance Victoria (2009) *In Pursuit of Additional Value: A Benchmarking Study into Alliancing in the Australian Public Sector*, Melbourne.

Griggs L, Freilich A and Webb E (2011) “Challenging the notion of a consumer: Time for change”, *Competition and Consumer Law Journal* **19**: 52-77.

Paterson J (2009) “The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts” *Melbourne University Law Review* **33**: 934-956.

Queensland Building Services Authority (2012) *Payment Dispute Resolution in the Queensland Building and Construction Industry*, Brisbane.

Speranza N (2011) “An evaluation of Australian security of payment and United States construction lien law”, *Building and Construction Law Journal* **27**: 169-193.