Latest Developments in Security of Payment Law (3)

Legislative reform: the Commonwealth Government inquiry and prospects for uniform Security of Payment legislation

The first statutory adjudication system in common law countries was introduced to England and Wales in 1996.

In 1999, drawing on but not replicating the English model, NSW was the first Australian jurisdiction to enact legislation for construction industry payment security.

Other states and territories followed, and since 2009 security of payment laws have been in place throughout Australia.

However, not one state or territory scheme is the same as any other. There is a substantial difference in philosophy between, on the one hand, NSW, VIC, QLD, SA, TAS and the ACT (the East Coast model), and on the other, WA and the NT (the West Coast model). There are further differences in substance and detail within each group (especially the East Coast model). And far from there being any move to harmonise approaches, continual piecemeal amendment by state and territory parliaments has ensured widening divergence over time.

Construction is without doubt a national industry – the inefficiencies imposed by such local differences are obvious.

The need for a national approach to security of payment was raised as long ago as 2002, by the Cole Royal Commission into the Building & Construction Industry. Cole noted that "*it is not obvious why subcontractors in one State or Territory have better prospects of receiving payment for their work than subcontractors working in any other State or Territory*". Until recently, Mr. Cole's recommendations have not been followed up. Instead, State inquiries have lead to piecemeal changes in some states, and not others.

The first step in putting national security of payment legislation back on the agenda was the reference in December 2014 of to the Economics References Committee of the Senate of questions regarding insolvency in the construction industry. The Committee reported on 3 December 2015. One recommendation was that "*the Commonwealth enact national legislation providing for security of payment and access to adjudication processes in the commercial construction industry*".

A further year on, in December 2016, the Turnbull government announced a review of security of payment laws by John Murray AM. The Government noted that "*[a]cross Australia, there are significant differences in approach to security of payments laws, which impact on the level of protection afforded to subcontractors. In order to identify best practice, Mr. Murray will undertake a wide-ranging review in consultation with business, governments, unions and other relevant interested parties*".

The terms of reference direct Mr. Murray to review security of payment legislation in all jurisdictions to identify areas of best practice for the construction industry.

Mr. Murray is required to report by 31 December 2017.

The fundamental questions for Mr. Murray seem to include:

- should there be a national approach to security of payment?
- if so, how is harmonisation best achieved?
- what model should a national scheme adopt?

Interestingly, while Mr. Murray is asked to take the reports of the Senate References Committee and the Cole Royal Commission and other inquires into account, the reference does not specifically direct him to propose a national scheme.

However, there does seem to be broad consensus in the industry that a national scheme is necessary. A national approach was endorsed by Cole Royal Commission and the Senate References Committee. It would be surprising if Murray did not follow their lead.

Options for a national approach would include:

- the States making a reference of powers to the Commonwealth pursuant to s51(xxxvii) of the Constitution;
- a uniform model to be developed by the states, territories and Commonwealth (the Australian Consumer Law, for example, is uniform law);
- unilateral legislation by the Commonwealth relying on its constitutional powers, most importantly the corporations power.

Both Cole and the Senate backed the third option. They recognised the limitations on Commonwealth legislative powers, but political reality is against the first two options.

If this is what Mr. Murray proposes, it will take time for the legislation to be drafted, industry to be consulted and then a bill put to Parliament, and debated and enacted. With electoral cycles, we might expect Commonwealth Security of Payment legislation to be in place some time in the next 5 years or so.

The model to be proposed by Mr. Murray is an open question.

The East Coast model is constructed around dramatic consequences for failure to dispute a claim, and is perceived by some to unduly favour the contractor. The West Coast model is closer to the original English model, has no opt-in requirement[1], and adjudication may be initiated by either party to the construction contract. Mr. Murray may well propose a scheme that takes what he sees as the best features from each state.

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[1] the requirement for valid payment claims to be labelled "This is a claim under the [Security of Payment Act of the relevant State]")