A proposal for a ‘Dual Scheme’ of statutory adjudication for the building and construction industry in Australia

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Abstract:
In Australasia there are two different models for adjudication in the building and construction industry. The first is the ‘Defined Scheme’. It is the scheme adopted under the ‘Australian Model’ of adjudication as applied in New South Wales, Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory. The Defined Scheme is also applied in Singapore. The second is the ‘Non-specific Scheme’. It is the scheme adopted under ‘UK Model’ of adjudication as applied in Western Australia, Northern Territory and New Zealand. This paper describes how a ‘Dual System’ of adjudication could work and how it would resolve many of the existing problems with the ‘Defined Scheme’ of adjudication in the Australian building and construction industry. The proposed Dual Scheme is a combination of the Defined Scheme and the Non-specific Scheme of adjudication. It allows for adjudication of Progress Claims (just as they are adjudicated now under the Defined Scheme), but also provides for separately adjudicated Money Claims in a similar way to that done under the Non-specific Scheme. The main advantage of the proposed Dual Scheme is that both parties to a construction contract can take advantage of adjudication like in ‘Non-specific Scheme’ of adjudication whilst simultaneously maintaining the integrity, and the relative time and cost benefits, of the Defined Scheme in dealing with progress payment claims. Examples of how the Dual Scheme works, as proposed here, are provided in the Appendix.

Keywords: Australia, Dual Scheme, security of payment, statutory adjudication.

1 Introduction

1.1 Security of payment problem in the Australian construction industry

In August 2001, the Honourable Terence Cole was appointed a Federal Royal Commissioner to inquire into a range of matters relating to the Australian building and construction industry. This Royal Commission was the first national review of the conduct and practices in the Australian construction industry (Cole, 2003). One of the issues before the Commissioner was ‘security of payment’ in the Australian
construction industry. In February 2003, the Commissioner presented his Final Report (comprising 23 volumes) to the Australian Governor-General. The Commissioner gave his recommendations in respect of the security of payment issue in Volume 8 of the Final Report. In summary, the Commissioner considered the security of payment issue to be one of national relevance (Brand and Uher 2010).

In the present context ‘security of payment’ is a generic term used to describe “the entitlement of contractors, subcontractors, consultants or suppliers in the contractual chain to receive payment due under the terms of their contract from the party higher in the chain” (NSW Government 1996:41). Thus, the security of payment problem is the “consistent failure in the building and construction industry to ensure that participants are paid in full and on time for the work they have done, even though they have a contractual right to be paid” (Commonwealth of Australia 2002:7). In general, the security of payment problem relates to the arbitrary devaluation, late payment and/or non-payment of progress claims. It is a persistent problem for those who perform construction work, or supply goods and services, in the construction industry. In the second reading speech, the NSW Minister for Public Works and Services, Hon. Morris Iemma (1999:103), stated:

It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families…The [New South Wales] Government is determined to rid the construction industry of such totally unacceptable practices.

The tactic of principals and contractors in delaying payments, or unduly reducing the value of payments, is designed to enhance their positive cash flow at the expense of subcontractors and suppliers. To recover payments due under a contract, subcontractors and suppliers have generally relied on one or more of traditional dispute resolution processes, such as arbitration (if available under the contract) and/or litigation. However, according to Cole (2003:10):

There is evidence based on comments made by subcontractors and their industry association representatives that some subcontractors fail to take the necessary actions and remedies available to them under the law (or in contract)…Reasons for this may include the high cost and time delays in taking legal action[…]

The prohibitive costs and time delays involved in recovering payment under traditional dispute resolution processes has often led subcontractors and suppliers to simply abandon their contractual right to payment and to move onto other construction projects in order to maintain cash flow. Cash flow is the “lifeblood of the construction industry”.1

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1 Iemma M, Member for Lakemba, Legislative Assembly, Second Reading Speech (Hansard), Building and Construction Industry Security of Payment Amendment Bill (NSW), 15 November 1999 at 81; see also Dawnays Ltd v FG Minter Ltd (1971) 1 WLR 1205 (CA) whereby it was held that an employer was obliged to pay a sum certified by an architect. The justification for this decision was said to be that cash flow was the lifeblood of the building trade.
The prohibitive costs and time delays involved in recovering payment under these processes has often led subcontractors and suppliers to simply abandon their right to payment and move onto another project in order to maintain cash flow (Commonwealth of Australia, 2002).

1.2 Legislative response to the security of payment problem

The *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘the NSW Act’) was introduced in an attempt to counter the security of payment problem in New South Wales (‘NSW’). New South Wales was the first Australian jurisdiction to introduce this form of legislation. The object of the NSW 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”. To achieve this objective, the NSW Act introduced new statutory rights for claimants, such as: a right to progress payments; a right to interest on late payments; a right to suspend work; and a right of lien. The NSW Act also renders void ‘pay-when-paid’ clauses in construction contracts, and the parties cannot contract out of the NSW Act.

In addition, the NSW Act introduced a unique form of ‘rapid adjudication’ of disputes over progress payment amounts whereby an independent adjudicator makes an interim determination as to the amount of progress payment to be paid to a claimant by a respondent. Only a claimant can initiate the adjudication process, however, both parties are entitled to make submissions to the adjudicator (subject to s. 20(2B) of the Act). An adjudicator can only be appointed by an Authorised Nominating Authority (ANA) chosen by the claimant.

The procedures and timeframes in relation to the adjudication process are strict and governed solely by the NSW Act. An adjudicator’s determination, while not final, is binding on the parties until the dispute is resolved by private agreement, a court, or some other process. If the respondent does not pay the adjudicated amount by the relevant date, the adjudicator’s determination is then capable of being registered as a judgement in a court of competent jurisdiction via a relatively straightforward administrative process prescribed under the NSW Act, and is enforceable accordingly. If, subsequently, a respondent applies to the court to have the judgement set aside, the respondent will not be entitled to bring a cross-claim against the

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claimant, or to raise any defence in relation to matters arising under the construction contract or to challenge the determination by the adjudicator (other than on grounds of an adjudicator’s jurisdiction). In addition, the respondent must pay into court as security the unpaid portion of the adjudicated amount pending the outcome of that proceeding.

At the time the Final Report was presented, only New South Wales and Victoria had construction industry specific security of payment legislation in operation. The Victorian Act was closely modelled on the NSW Act in its unamended form. However, since that time both the NSW Act and the Victorian Act have undergone significant amendments. This has resulted in a significant divergence in the comparative operation and effect of these Acts, notwithstanding that both maintain virtually identical objectives.

Since the Final Report was presented, Queensland, Western Australia and the Northern Territory have all enacted construction industry specific security of payment legislation (hereafter referred to as ‘the QLD, WA and NT Acts’, respectively). The QLD Act is closely modelled on the NSW Act (as amended). The NT Act, on the other hand, is largely modelled on the WA Act, which, in turn, is largely modelled on the UK and New Zealand ‘construction contracts’ legislation (hereafter referred to as the ‘UK and NZ Acts’, respectively).

The uptake of ‘security of payment’ legislation in Australia continues. At the time of writing, the South Australian, Tasmanian and Australian Capital Territory Parliaments have passed legislation, all of which are largely modelled on the NSW Act (hereafter referred to as the ‘SA, Tas and ACT Acts’, respectively). The similarity of the recent legislation introduced in South Australia, Tasmania and the Australian Capital Territory to the existing legislation in New South Wales, Queensland and Victoria clarifies that there are now two models in operation in Australia – the Western Australian/Northern Territory model (based closely on the UK legislation), and the uniquely ‘Australian Model’ employed by the remaining States and Territory.

In addition to the UK and NZ Acts previously mentioned, Singapore (‘the Singapore Act’) has in operation security of payment legislation, which is largely modelled on the

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20 Building and Construction Industry Payments Act 2004 (Qld).
21 Construction Contracts Act 2004 (WA).
22 Construction Contracts (Security of Payments) Act 2004 (NT).
NSW Act (as amended). Consequently, the Singapore Act fits within the Australian Model of adjudication.

2 ‘Defined Scheme’ and ‘Non-specific Scheme’ of adjudication

In Australasia there are two different models for adjudication in the building and construction industry. The first is the Defined Scheme. This is a term coined just for this paper. It is the scheme adopted under the Australian Model. The Defined Scheme was first created by the NSW Act, and is the scheme subsequently adopted for the Vic, Qld, ACT, Tas and SA Acts. It is a Defined Scheme because it only provides for claims by one party, and only for defined money claims, namely, progress claims. Only the person who carries out construction work or provides related goods or services can make claims under the Defined Scheme and only progress claims are adjudicated.

The second is the Non-specific Scheme. This is a term coined just for this paper. The Non-specific was first created by the UK Act, and is the scheme subsequently adopted for the NZ, WA and the NT Acts. It is a Non-specific Scheme because it does not specify that only one party can make claims and it is not limited to a specific type of money claim under a contract. For example, the Non-specific Scheme adopted for the NZ Act allows either party to a construction contract to refer to adjudication any ‘dispute’.30 A dispute is defined as ‘a dispute or difference that arises under a construction contract’.31 But only an adjudication determination that a party is liable to pay money is enforceable.32 Determinations on other questions of rights or liabilities are unenforceable. Furthermore, the WA Act allows either party to a construction contract to refer to adjudication a ‘payment dispute’.33 In this case, a payment dispute is defined as a claim for money or for release of any security due to be returned by a party.34 The NT Act follows closely the WA Act in this regard.

The Defined Scheme has some important advantages in that, because it is limited in scope, it enables rapid and relatively inexpensive adjudication of progress claims. On that basis, it is not surprising that empirical research indicates significant use of the statutory adjudication process in the NSW construction industry (Brand and Uher 2007).

However, the courts, led by the Supreme Court of NSW, have allowed progress claims to include claims for delay costs and damages.34 Instead of being merely able to use the legislation to recover a progress payment for work actually carried out, some claimants have used it to recover payments on account for damages for breach of contract and payment on account for ambition claims for alleged delay costs. The authors submit that this was not the intention of the legislation. Nevertheless, this judicial interpretation results in a serious imbalance because, under the Defined Scheme, only one party can refer a claim to adjudication and recover money. The Victorian legislators attempted to

29 Construction Contracts Act 2002 (NZ) s. 25.
30 Construction Contracts Act 2002 (NZ) s. 5.
31 Construction Contracts Act 2002 (NZ) s. 58.
32 Construction Contracts Act 2004 (WA) s. 25.
33 Construction Contracts Act 2004 (WA) s. 6.
34 See, for example: Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 941; and Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd & Ors [2006] HCA Trans 9 (3 February 2006).
solve the problem by making an adjudication determination void to the extent that it includes ‘excluded amounts’. These are defined to be claims for delay costs and damages and some variation claims. However, this amendment does not address the basic imbalance; only one party can take advantage of adjudication. The Vic Act is still the Defined Scheme.

3 The ‘Dual Scheme’ proposal

3.1 Introduction

The Dual Scheme proposal is to retain the Defined Scheme for purely progress payment claims, (i.e., for claims for the value of work, goods or services that have actually been provided), and to adopt the Non-specific Scheme for other payment disputes.

The Dual Scheme would continue the existing legislation for ‘Progress Claims’ (redefined to exclude the broader interpretation sometimes adopted by the Courts) and would allow either party to make other ‘Money Claims’ and have them adjudicated.

The process of adjudication for ‘Progress Claims’ would be basically the same as now exists. However, there are likely to be more adjudication applications made because the party now precluded from claiming under the Defined Scheme would be given the opportunity to make claims under the Dual Scheme via the Money Claim extension to the Defined Scheme.

It is proposed that the Dual Scheme would retain the objective of the Defined Scheme (i.e., “to ensure that any person who undertakes to carry out construction work … is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work”). But the Dual Scheme would also adopt the objective of the Non-specific Scheme. For example, the Non-specific Scheme adopted by the NZ Act provides “for the speedy resolution of disputes arising under a construction contract” and to provide “remedies for the recovery of payments under a construction contract”. Similarly, in the Non-specific Scheme adopted by the WA Act, the objective is “to provide a means for adjudicating payment disputes arising under construction contracts”.

Under the Dual Scheme, the person who carries out construction work or provides related goods or services could continue to make progress claims and have them adjudicated in exactly the same way as now occurs, but progress claims would be redefined to exclude claims for other than the value of the work actually carried out or the goods and services actually provided. However, any claim for reimbursement of alleged extra costs incurred as a consequence of delay, and claims for damages, would not be Progress Claims under the Dual Scheme. If that person wants to recover damages, for example, for delay or other breach of contract or for release of a bank

36 Building and Construction Industry Security of Payment Act 2002 (Vic) s. 10B.
37 Building and Construction Industry Security of Payment Act 2002 (Vic) s. 10B.
38 Construction Contracts Act 2002 (NZ) s. 3
guarantee, the person would have to make a separate Money Claim. The other party to
the construction contract would be equally entitled to make a Money Claim for damages
for delay or other breach of contract.

The abuse which the Defined Scheme was established to abolish was the practice of
respondent’s to a payment claim withholding payment without a reason or on account of
a cross-claim yet to be decided. In the absence of compulsory rapid adjudication,
notwithstanding that the respondent has the benefit of the value of work, goods or
services, the respondent can withhold payment and force the claimant (i.e., the person
making the payment claim) to embark upon costs litigation or arbitration to recover
payment. Often the amount involved would not justify the expense of litigation or
arbitration and the claimant would be left with no effective remedy.

The Defined Scheme was designed to provide a more even playing field by allowing an
adjudicator to decide that the claimant is entitled to a progress payment on account
pending a final decision in arbitration or litigation. Through the authors’ direct
involvement in adjudication in Australia, experience indicates that, after adjudication, it
is very rare for either party to embark on litigation or arbitration to obtain a final
decision; it is common for adjudication to be used, in effect, to deal with the final
account. This is consistent with the UK experience of adjudication (Kirkham 2004).

However, the problem with the Defined Scheme is that if, at the time for a progress
payment, the respondent has not obtained a final determination that the respondent is
entitled to an amount in respect of a cross-claim, the respondent cannot withhold
payment on account of the cross-claim. Under the Defined Scheme there is no
mechanism for the respondent to initiate an adjudication to obtain a determination, on
an interim basis, of the respondent’s claim. Consequently, when it comes time for a
progress payment, the respondent is unable to set off against the progress claim amounts
which the respondent claims. There are some exceptions, but there is a basic imbalance
which arises from the fact that the claimant can claim damages and the respondent
cannot. Examples below will illustrate how the Dual Scheme both protects the person
who has carried out work or supplied goods or services while at the same time allowing
the other party an equal right to adjudication of claims.

In the Appendix, there are a number of examples of how the Dual Scheme would work
in practice.

3.2 Progress Claims (the ‘Defined Scheme’)

Under the Dual Scheme progress claims would be made and adjudicated just as they are
now. The basic difference would be that progress claims would be restricted to claims
for the value of work actually carried or goods or services actually provided, including
work, goods or services comprised in variations, retention moneys and return of cash
security. Reasons for withholding payment would be limited to arguments as to the
value of work, goods or services, including whether they are defective and the estimated
cost of rectifying defects, and the set off of agreed amounts and adjudicated amounts.

For example, assume that a construction contract is for the construction of a factory for
the lump sum of $1m. Assume that retention moneys are $10,000 and there is also a
bank guarantee provided by the contractor for $15,000. The contractor could make progress claims in the usual way for instalments of the contract price and, in due course, refund of retention moneys. The Defined Scheme presently does not encompass claims for release of bank guarantees. It is proposed that this be included as a Money Claim, as is the case under the WA Act. If the principal has directed extra work by way of a variation, the contractor could include the value of that work in a progress claim. The contractor’s progress claims would be adjudicated in the same way as occurs at present and on the same timetable.

Instead of the current endorsement: “This is a claim under the … Act”, a progress claim would have to have the endorsement: “This is a Progress Claim under the … Act”. A Progress Claim is for an amount that will be payable after the claim is made. It is payable on the due date decided by the adjudicator.

3.3 Other Money Claims (the ‘Non-specific Scheme’)

The Defined Scheme legislation would be amended to allow either party to the construction contract to make money claims. The claim would have to be endorsed, “This is a Money Claim under the … Act”.

The claim would be for an amount allegedly already due at the date of the claim. For example, if a progress claim is not paid on the due date then the contractor could opt to make a Money Claim for the amount overdue. The contractor could make a Money Claim at any time for damages for breach of contract. For example, if the contractor claims that the principal repudiated the contract, the claimant could make a progress claim in the usual way for the value of work actually performed but the progress claim could not include damages for the loss of the bargain – that would be a Money Claim.

The principal under the construction contract referred to in the example, could make a Money Claim at any time for liquidated damages for delay or any other damages allegedly due at the date of the money claim. For example, if the principal wants to set off against future progress payments an amount allegedly due to the principal for damages for breach of the contract by the contractor, the respondent can at any time make a Money Claim against the contractor.

To avoid confusion, it is proposed that the term ‘claimant’ presently used in the Defined Scheme to describe the person who contracts to provide work, goods or services, would be replaced with the term ‘Supplier’, and the term ‘respondent’ would be replaced by ‘Purchaser’. The term ‘Supplier’ would describe a person who contracts to supply work, goods or services. The term ‘Purchaser’ would describe the person who is or may be liable to pay the Supplier for the work, goods or services. The term ‘Claimant’ would then be used to describe the person who makes a progress claim or a money claim. The term ‘Respondent’ would be used to describe the person against whom the claim is made.

Only a Supplier could make a Progress Claim, but a Money Claim could be made by a Supplier against a Purchaser and vice-versa.

The process for a Money Claim would be that the person claiming, the Claimant, would make a claim against the other party to the construction contract for an amount which is allegedly due to the Claimant at the time of the claim. The claim would be served just as a Progress Claim is served but, unlike a progress claim, a Money Claim could be served at any time. This is because a Money Claim is for an amount [whether a debt or damages] allegedly due when the claim is made. The Respondent would have a prescribed period, e.g., 10 business days to provide a ‘Defence’. The term ‘Defence’ is recommended to avoid confusion with a ‘payment schedule’. A payment schedule is provided in answer to a Progress Claim.

If no Defence is provided within the prescribed time, the Claimant would have to give a reminder, similar to a s.17(2) notice under the NSW Act, and if no Defence was received within, say, another 10 business days, the Claimant could initiate an adjudication by making an adjudication application to an Authorised Nominating Authority. The claim would be adjudicated in the usual way. The adjudicator would decide whether the Claimant is entitled to the amount demanded, or any portion. The adjudicator would not decide a due date for payment, as happens with a Progress Claim. Either the amount is due at the date of the claim or it is not properly the subject of a Money Claim.

The Money Claim could include a claim for interest up to the date of the adjudicator’s determination. In that event, to calculate the interest, the adjudicator would have to decide when, in the past, the amount claimed fell due. The Respondent who fails to serve a Defence within time would be precluded from making an adjudication response.

The Defence could be simply be a defence or it could be a cross-claim or both a defence and cross-claim. With the above timetable, the Respondent would have at least 21 business days to prepare and serve a Defence. If the Defence is simply a defence, the Claimant could immediately make an adjudication application. If the Defence includes a cross-claim and the Claimant wishes to defend the cross-claim, the Claimant would have a prescribed period in which to lodge a response to the cross-claim. It is suggested that this response be called a ‘Rejoinder’. In an adjudication, the parties would be limited to submissions in support of their respective Money Claims, Defence (including cross-claim, if any) and Rejoinder. If the Claimant does not make an adjudication application, the Respondent would have the right to make an adjudication application in respect of the Respondent’s cross-claim.

This may sound complicated but it simply mirrors the usual process of claim, defence, cross-claim and rejoinder familiar to arbitrators and courts. The Claimant is the equivalent of the plaintiff in litigation and the Respondent is the equivalent of the defendant. The adjudicator could decide that either party is indebted to the other. The adjudicated amount would have to be paid within a prescribed period. The successful party would be entitled to apply for an adjudication certificate and register it as a judgment. The amount paid would be a payment on account and in other proceedings it could be decided that the amount must be repaid with interest.
Here is a simple example of the Dual Scheme. Assume that a Purchaser claims that at 30 June 2010 the Supplier is late in achieving practical completion and liable for $10,000 for liquidated damages. The Purchaser [now the Claimant] can make a Money Claim. The Supplier [now the Respondent to the Money Claim] could make a cross-claim for an amount that the Supplier claims is then due. The cross-claim could be for a progress payment that is already overdue but not for a Progress Claim. That is a different matter. Assume that the Respondent’s Defence is simply that the Claimant is not entitled to any liquidated damages. Assume that the Defence is served within 10 business days. The Claimant can make an adjudication application immediately. The adjudicator would have a prescribed time to make a decision on the issue. Assume that the adjudicator decides on 31 July 2010 that the Claimant [Purchaser] is entitled to $10,000.

Further assume that on 1 August 2010 the Supplier makes a Progress Claim for $50,000. The Supplier would have to pay the Purchaser the $10,000 within the time allowed by the Act or it would be set off against the amount of the progress payment. The Progress Claim would be decided by an adjudicator in the usual way but the adjudicator would not be able to override the previous adjudicator’s decision on the $10,000 (see further discussion on ‘issue estoppel’ below).

Money Claims should be confined to amounts due under or for breach of contract. It would not be appropriate to bring in claims under the Trade Practices Act 1974 (Cth) (for example, a claim for misleading and deceptive conduct arising out of the formation of a construction contract), or claims in tort or restitution, since these would be claims made outside the construction contract.

Furthermore, because Money Claims may include cross-claims and are, therefore, likely to be more difficult to decide than Progress Claims, it is proposed that an adjudicator should have limited power to unilaterally extend the time for making a decision on a Money Claim.

4 Other issues relating to the ‘Dual Scheme’ proposal

4.1 Other Money Claims (the ‘Non-specific Scheme’)

The term ‘issue estoppel’ has been chosen to describe not only that a previous adjudicator’s decision should not be overruled by a subsequent adjudication decision but the need for a more general bar on adjudicator shopping and a multiplicity of Money Claims.

It is proposed that in a Money Claim the Claimant (whether the Supplier or the Purchaser) should include all amounts then said to be due from the Claimant to the

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41 See, for example: Peninsula Balmain Pty Limited v Abigroup Contractors Pty Limited [2002] NSWCA 211.
Supplier under or for breach of contract. What is required is something along the lines of the rule in *Henderson v Henderson*,\(^{43}\) which (Barnett 2001:24):

[...] requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided once and for all [subject to any appeal]. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for a decision on the first occasion but failed to raise.

Therefore, applying the rule in *Henderson* to adjudication, a Claimant should not be able to include in any subsequent Money Claim any amount that was allegedly due to the Claimant at the date of an earlier Money Claim by the Claimant but was not included in that earlier Money Claim.

Take the earlier example; the Purchaser makes a Money Claim at 30 June 2010 for $10,000 for liquidated damages. That is the only amount said to be due from the Supplier to the Purchaser at 30 June 2010. In a subsequent money claim, the Purchaser could not claim for other damages allegedly due at 30 June 2010. If an adjudicator has decided that the Purchaser was entitled to only $7,500 for liquidated damages at 30 June 2010, any subsequent adjudicator could not decide differently. But a subsequent adjudicator could decide that additional liquidated damages were due for periods after 30 June 2010.

It is important that the Purchaser is not able to make separate Money Claims for every defective brick.\(^{44}\) Consequently, if the Purchaser claims in a Money Claim dated 30 June 2010 that the Purchaser is entitled to $17,000 for the cost of rectifying defects in the Supplier’s work, that amount should cover all defects rectified at 30 June 2010. Similarly, if the Supplier makes a Money Claim at 30 June 2010 for $18,000 for delay costs, that claim should cover all delays and all delay costs incurred at 30 June 2010.

While in litigation and arbitration the principle of issue estoppel is a bar to making further claims, in adjudication, the principle would be limited to making further Money Claims in respect of entitlements that existed at the date of an earlier Money Claim but were not included in the earlier Money Claim. Therefore, under the proposed scheme, when the first adjudicator decides that at a certain date the Respondent was not entitled to liquidated damages or an amount for defective work, the Respondent would not be able to again claim for amounts allegedly due for liquidated damages and defective work at the certain date. The Respondent could make a claim for liquidated damages for defective work which did not exist until after the certain date.

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4.2 Other Money Claims (the ‘Non-specific Scheme’)

It is important that any legislation allows a claimant to include in a Money Claim a claim for release of a bank guarantee or portion thereof. The construction contract should provide when the bank guarantee is due for release. Assume that it is 28 days after the end of the defects liability period and the guarantee is for $15,000. If the Purchaser wants to claim an entitlement to withhold release of the guarantee on account of defective work for which the Purchaser claims $25,000, the Purchaser should make a Money Claim for $25,000 and have that adjudicated before the time for release of the bank guarantee. If the adjudicator decides that the Purchaser is only entitled to $5,000, the adjudicator could decide that the Purchaser must release $10,000 of the amount of the guarantee. A guarantee can be released in part.

There is need for legislation to bar the calling up of a bank guarantee before there is a final decision or a decision in an adjudication that there is a debt against which the proceeds of the bank guarantee can be applied.

5 Concluding remarks

The Dual Scheme would require legislation. It would provide for Progress Claims, Payment Schedules, liability in the absence of a payment schedule, and adjudication just as now occurs in the jurisdiction operating under the Australian Model.

The Dual Scheme would also provide that either party to a construction contract can make a Money Claim. That is a claim for amounts allegedly already due as a debt or damages under or for breach of the construction contract. That is the Non-specific Scheme that exists under the NZ, WA and NT Acts.

A Money Claim would be adjudicated similarly to Progress Claim but with a different timetable and allowance for a cross-claims and a rejoinder.

A Progress Claim could only be made on or from a reference date by a Supplier (i.e., the party to a construction contract who contracts to supply work, goods or services to another person, the Purchaser). A Money Claim could be made at any time by either party.

The essence of the Dual Scheme is that a Supplier should be able to recover progress payments for the value (taking into account defects) of work goods or services actually supplied without deduction of amounts for cross-claims which have not yet been quantified in adjudication or in final proceedings. Absent defective work, the only reason that a Purchaser could have for not paying the unpaid value of work, goods or services the benefit of which the Purchaser has received, is that the Purchaser is entitled to set off an amount already determined to be due from the Supplier to the Purchaser.
6 References


Further reading:


Appendix – Examples

Example 1: Progress claim and no payment schedule

This situation is very common. The Supplier claims an amount as a progress payment or a final payment or for return of retention. If the Purchaser fails to provide a payment schedule within 10 business days the Supplier can apply to a Court for summary judgment for the claimed amount45 or elect to go to adjudication and give the Purchaser another opportunity to provide a payment schedule.

Assuming that the Supplier elects to go to adjudication and no payment schedule is provided within time, the adjudicator would decide the amount of the progress payment in the usual way.

The difference under the Dual Scheme would be that if the Progress Claim included a claim for damages, the adjudicator would not include damages in the amount of the progress payment. Similarly, if the Supplier applied to a Court for summary judgment, the Court could refuse to enter summary judgment (or summary judgment, if entered, could be set aside) if the Purchaser could show that the progress claim was not just a Progress Claim but includes a claim for damages. This would avoid the situation that occurred in the Walter Construction case where the claimant recovered a summary judgment which included amounts which could not properly be included in a progress claim.

It seems that in the majority of cases where there is no payment schedule Suppliers opt for adjudication rather than summary judgment. Consequently, the change which the dual scheme would make would have minimal impact. At the time of the Walter Construction case, the option to apply for adjudication rather than summary judgment did not exist.

2. Payment schedule disputes value of work

In many instances, the Purchaser’s only reason for withholding payment is that the work does not have the value claimed (i.e., the Supplier has overvalued it having regard to the contract price and the extent of work carried out at the reference date) or that there is defective work and the Purchaser is entitled to have the estimated cost of rectifying defective work taken into account in calculating the amount of the progress payment.

In this situation there would be no difference between the Dual Scheme and the Defined Scheme. The difference between the Dual Scheme and the Non-specific Scheme would

45 See, for example: Walter Construction Group v CPL (Surry Hills) [2003] NSWSC 266 (‘Walter Construction case’)

be in detail not in substance; terminology and times for making claims would be different.

3. Payment schedule asserts that payment claim includes amounts that cannot be included in a progress payment

Sometimes in a payment schedule the Purchaser asserts that under the terms of the construction contract or the legislation the Supplier is not entitled to a progress payment on account of some or all of the amount claimed because the claim (or part) is for damages or for extras (particularly delay costs) for which there is no entitlement or the entitlement is barred.46

This situation is common. Under the Defined Scheme it has given rise to the most problems and the most contentious litigation. It is the problem which the Victorian 2006 amendment attempts to avoid by creating the concept of “excluded amounts”. The term “ambush claim” has been used to describe claims for damages and delay that are included in progress claims. It is this situation which has generated, quite legitimately, the most criticism of the Defined Scheme.

Under the Dual Scheme the entitlement to a progress payment would be confined to a claim for the value of work actually carried out and goods and services actually provided. If, in the payment schedule, the Purchaser identifies other claims, then in the calculation of the progress payment due the adjudicator would not include any amount for these claims.

The Supplier could pursue by way of a Money Claim the delay claims or other damages claims which cannot be made in a Progress Claim.

4. Payment schedule asserts that a claim is barred

In a payment schedule, the Purchaser often relies upon a time bar clause or other clause in a contract to bar an entitlement. The authors recommend that, in a contract of adhesion, unfair time bar or other barring clauses be rendered void just as “pay when paid” clauses have been rendered void in each of the Acts referred to above.

However, assuming that such a barring clause is valid, then under the Dual Scheme the situation would be no different to that now existing under both the Defined Scheme and the Non-specific Scheme. An entitlement could be barred by a time bar clause or other barring clause that did not contravene the “no contracting out” provisions of the Act.

5. Payment schedule includes a cross-claim

It is common for a Purchaser to withhold payment on account of alleged set offs for “back charges”. These are claims by the Purchaser that the Supplier is liable to the purchaser for liquidated damages or other damages. The alleged dam ages may include the cost incurred by the Purchaser in allegedly rectifying defective or unfinished work.

They may include alleged damages consequent upon termination of the contract before completion. They may even include debts allegedly owed under another contract or set offs on account of claims by a third party against the Purchaser. What these back charges have in common is that they are all for amounts for which liability or quantum or both have yet to be finally decided by a court, tribunal or arbitrator or under a dispute resolution provision of the construction contract.

Where, in a Defined Scheme, the amount of a progress payment is to be calculated under the terms of the Act, 47 the Purchaser is not entitled to set off claims for back charges. The problem of deciding a set off claim for back charges only arises where the construction contract has a provision for set off against progress payments of amounts claimed by the Purchaser.

There are differences in the approach taken by adjudicators. Some take the approach that only a debt (owed to the Purchaser) that is admitted by the Supplier or has been decided by a court or tribunal or in arbitration or has been created under a dispute resolution clause in the contract can be set off against progress payments. Other adjudicators will decide disputed issues of liability for and quantum of the back charges. Sometimes this involves deciding what extensions of time the Supplier was entitled to and whether the superintendent acted fairly. 48

A legitimate criticism of the Defined Scheme is that the fast track system was designed for calculating the amount of a progress payment and was not intended to cover the more difficult task of deciding damages claims. It was not designed for deciding claims for extensions of time or for deciding whether breaches of contract had occurred and, if so, the quantum of damages. On the other hand, the Non-specific Scheme was designed for that purpose. That is the reason for creating a Dual Scheme.

The major difference between the Dual Scheme and the Defined Scheme would be that the Purchaser would not be able to raise a back charge as a reason for withholding payment of a progress payment, or set off against a progress payment an amount for a back charge, unless liability for and the quantum of the Purchaser’s entitlement had been admitted by the Supplier or finally decided in litigation or arbitration or under a dispute resolution clause or had already been decided in an adjudication of a Money Claim.

This would simplify adjudication of a progress claim yet allow a Purchaser a right to pursue claims against the Supplier in adjudication of a Money Claim. Immediately a party to a construction contract considers that the other party has breached the construction contract, that party can make a Money Claim against the other party. The other party has an equal right to respond with a cross-claim. This is the Non-specific scheme. It is a fair scheme. The shortcoming in the Non-specific Scheme is that it does not provide a fast track process for recovery of a progress payment. The Dual Scheme combines the advantages of both Non-specific Scheme and the Defined Scheme.

47 See, for example: Building and Construction Industry Security of Payment Act 1999 (NSW) s. 9(b).
To summarise, in an adjudication of a Progress Claim, the adjudicator would not decide any cross-claims but would decide issues about the value of work, goods and services, defects and the estimated cost of rectifying defects.

6. A Supplier claims delay costs

In larger construction contracts, the Supplier frequently claims that the Purchaser delayed the Supplier and the Supplier is entitled to delay costs. Under the Dual Scheme, the claim for delay costs could not legitimately be included in Progress Claim. At any time the Supplier could make a Money Claim for delay costs allegedly due up to the date of the Money Claim. The other party could raise a defence or cross-claim or both. The Supplier could concurrently make a Progress Claim and a Money Claim but only the latter could include a claim for delay costs. There is no necessity for the claims to be decided by the same adjudicator or at the same time.

At present, delay cost claims tend to be made as an ambit claim at the end of a project. This is because, as arbitration and litigation work, a party is effectively forced to leave all claims for damages until the end of the project. The right to have each claim for delay costs adjudicated immediately after the delay occurs would avoid the need for an ambit claim. Given this right, a clause in the contract could effectively and not unfairly bar the ambit claim for delay costs.

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