Chapter 9

Problems with the Security of Payments Acts

9.1 The introduction of SOP legislation across Australia is a positive development and one that accords with the recommendations of the 2003 Cole Royal Commission. However, many submissions and witnesses to this inquiry noted that substantial problems remain. This chapter examines these concerns, focusing on:

- the signing of false statutory declarations;
- the potential for subcontractors to face intimidation and retribution when attempting to enforce their rights under the Act;
- the cost of enforcement;
- the lack of education and support for subcontractors attempting to utilise the Act;
- the position of Authorised Nominating Agencies and the appointment of adjudicators;
- the speed of adjudication; and
- the problem of insolvency;

9.2 In large part, these difficulties stem from the fragmented approach to SOP legislation across the country. As tables 8.1–8.3 in chapter 8 illustrated, significant differences exist between and within each model. For individuals working across state and territory borders, these distinctions increase unfamiliarity and reduce the use—and thus effectiveness—of SOP legislation. As such, this chapter also examines the absence of a national security of payment act.

False statutory declarations

9.3 The requirement that contractors sign statutory declarations to the effect that all subcontractors have been paid when submitting a progress claim to the principal contractor is an important legislative provision. If effective, it ensures that subcontractors receive money owed in a timely manner. However, unfortunately, the committee heard from witnesses throughout the country that this legislation is not operating as intended. Mr Dave Noonan, National Secretary, CFMEU, stated:

> It is notorious in the industry that declarations are often filed by contractors seeking payment, and the contracts under the legislation have to state that subcontractors and employees have been paid. It is notorious that statutory declarations that are false are filed around the industry. That does happen.[1]

9.4 Mr Mick Buchan, Secretary, CFMEU WA, agreed. Mr Buchan considered that false statutory declarations are 'the most common problem' in ensuring that

1 *Official Committee Hansard*, 12 June 2015, p. 3. See also Mr Dave Kirner, Assistant Secretary, CFMEU South Australia, *Official Committee Hansard*, 21 September 2015, p. 31.

money owed is paid. He explained that too often contractors hold a 'folder full of blank declarations and they just sign them off like a piece of paper'.[2]

9.5 ASIC observed that this is an enduring problem and one that was highlighted in the Collins Inquiry into the construction industry in NSW.[3] Indeed, the Collins Inquiry found that the system was simply not working:

> The universally held view in the industry is that the use of statutory declarations to demonstrate that subcontractors have been paid, does no such thing. The discharge of the commitments referred to in the statutory declarations are not enforced, while some head contractors employ persuasive methods to ensure that what is 'due and payable' to subcontractors at a certain time under contract, becomes 'due and payable' at some later date so transforming a lie into a convenient truth.[4]

9.6 Mr John Chapman, South Australian Small Business Commissioner, agreed that, in large part, the problem is one of enforcement, explaining that it is not clear 'who is checking the statutory declarations'.[5] Mr Edward Sain, a construction industry consultant, agreed, informing the committee that he has brought this problem to the attention of the Minister for Planning in South Australia and heads of relevant departments but 'nobody is taking any notice of it'.[6]

9.7 This position supported the experiences of two subcontractors who appeared at the committee's hearing in Canberra on 12 June 2015. Mr Stelling and Mrs Gibson reported that evidence of false statutory declarations is rarely acted upon.

> **Mr Stelling**: Signing a stat dec when it is not true is a criminal offence; it is a federal offence. We rang the Federal Police to report it and the Federal Police said, 'Sorry, we do not take phone calls from the general public.' We did ask him why the number was in the phone book, and he said: 'I do not know. You will have to go to your local police station.' So we went to the local police station and did not get anywhere at all. There is the crime there. It is a crime and there are consequences, but nobody is making them happen.
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> **Mrs Gibson**: What I am seeing over and over again is: there are complaints and there is legislation and there are consequences, but no-one is enacting any of those consequences and they are letting the time lines slip so far that subcontractors are the losers every time.[7]

2 *Proof Committee Hansard*, 26 October 2015, p. 13.

3 ASIC, *Submission 11*, p. 31.

4 *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW* (2012), p. 46.

5 *Official Committee Hansard*, 21 September 2015, p. 8.

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

7 *Official Committee Hansard*, 12 June 2015, p. 30.

9.8 The prevalence of false statutory declarations is troubling. As Mr John Reynolds, Nova Legal, explained, this is a system that exists to prevent non-payment of subcontracts and it does not work.[8]

9.9 ASIC informed the committee that it has 'implemented a surveillance campaign that reviews the use of statutory declarations as the means by which principal contractors pay contractors for goods and services provided'.[9] Mr Brett Bassett, ASIC, explained further:

> we identified eight very large projects around Australia where, for a three-month period, we undertook surveillance of around 40 large- and small-sized subcontractors, looking for false statutory declarations. We have identified a number of what we think are false statutory declarations.[10]

9.10 Mr Bruce Collins, ATO, informed the committee that the ATO is assisting ASIC in this and similar campaigns. The ultimate aim of these campaigns is to refer relevant matters to state police.[11]

9.11 While prosecution may be useful in deterring some unlawful behaviour its effectiveness is likely only to be limited. Mr Chapman considered that a more successful approach to stopping the signing of false statutory declarations revolves around greater transparency. Increased transparency around the payment practices of head contractors might lead to greater self-regulation and a change in the culture of the industry, ultimately increasing positive outcomes for subcontractors. Mr Chapman explained:

> The issue I have is that part of the information that should be available to subcontractors is who is actually getting paid on a job. That information, in my view, should be published, and that is something that I am looking at at the moment.[12]

9.12 As Mr Chapman noted, making greater information available to subcontractors concerning the payment practices of head contractors and disputes arising from non-payment, may lead to subcontractors 'thinking twice about engaging with head contractor X'.[13] While 'naming and shaming' may give rise to issues of procedural fairness, the committee believes that this is an idea worthy of more detailed consideration.

9.13 The committee notes that the Queensland Building and Construction Commission publishes all results of mediation but does not name the parties. Instead, it distinguishes by class of building, whether the respondent is a head contractor or subcontractor, what was paid and what was claimed. Despite not naming the parties, Mr Chris Rankin, Executive Director ACMA, considered the detail 'phenomenally

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8 *Proof Committee Hansard*, 26 October 2015, p. 39.

9 ASIC, *Submission 11*, p. 31.

10 *Proof Committee Hansard*, 28 September 2015, pp. 35–36.

11 *Proof Committee Hansard*, 28 September 2015, p. 20.

12 *Official Committee Hansard*, 21 September 2015, p. 8.

13 *Official Committee Hansard*, 21 September 2015, p. 8.

good'.[14] It appears that South Australia is moving towards publishing all adjudication decisions too.[15]

Committee's views

9.14 The committee is concerned that false statutory declarations are signed and that evidence of such is not acted on by the proper authorities, possibly due to lack of resources. This weakens the effectiveness of SOP legislation and threatens the solvency and viability of honest industry participants—a problem that can have significant consequences throughout the wider community. The committee believes that the requirement in NSW under s 127 of the *Industrial Relations Act 1996* that head contractors provide some limited oversight concerning the payment of subcontractors' employee entitlements is a valuable provision. The committee does note, however, that a similar problem facing SOP legislation may present itself, and the proper authorities must be prepared to detect and enforce the law against individuals who fraudulently sign statements designed to avoid employee entitlements.

9.15 The committee appreciates ASIC and ATO's proactive steps to monitor the integrity of the payment system from principal contractors to subcontractors by reviewing statutory declarations. While the committee considers that this surveillance program could be extended and other coordinated programs developed, it accepts that prosecution is not the sole panacea. Rather, cultural change through greater transparency and self-regulation offers firmer potential for putting an end to the endemic use of false statutory declarations. On this point, the committee considers that the approach of the Queensland Building and Construction Commission is positive. The committee believes that each state and territory's government department or agency responsible for the relevant SOP Act could publish similar levels of de-identified information.

Recommendation 21

9.16 The committee recommends that ASIC and the ATO continue to develop and implement programs designed to monitor the integrity of the payment system, with the aim of referring relevant matters to relevant law enforcement agencies.

Recommendation 22

9.17 The committee recommends that state and territory government departments and agencies responsible for administering their security of payment legislation closely scrutinise the practice of providing false statutory declarations and, where necessary, launch prosecutions as a practical deterrent.

Recommendation 23

9.18 The committee recommends that each state and territory government department or agency responsible for the relevant security of payments act

14 *Official Committee Hansard*, 21 September 2015, p. 14.

15 *Proof Committee Hansard*, 4 November 2015, p. 37.

should follow the example in Queensland and publish publicly available, de-identified information concerning the outcome of payment disputes.

Intimidation and retribution

9.19 A second difficulty concerning the implementation of SOP Acts is linked to the signing of false statutory declarations. The committee heard evidence across the country that individuals who attempt to rely on their legislative rights under the SOP Acts may face intimidation or retribution. Mr John Chapman, South Australian Small Business Commissioner, informed the committee that such intimidation was occurring in South Australia:

> I also hear that people are threatened: 'If you use the Building and Construction Industry Security of Payment Act you won't get another job in this town.' I have a problem with that. That is intimidation.[16]

9.20 Mr Chapman explained that retired District and Youth Court Judge Alan Moss had recently completed an independent review of the South Australian SOP Act. As part of this review, Mr Moss and Mr Chapman spoke to a number of people who had experienced such intimidation. Mr Chapman continued:

> As part of the review I spoke to the reviewer, Alan Moss. We spoke to a number of people who were frightened. They were frightened to be seen in our office. They implored us not to publicly name them, because they were worried that they would be seen as troublemakers and not get further work.[17]

9.21 Mr Chapman noted that, in his experience, the intimidation 'tends to be [from] the head contractors', rather than from principals.[18]

9.22 Mr Dave Kirner, Assistant Secretary CFMEU SA, explained that under the South Australian SOP, a subcontractor who wants to rely on their rights under the Act must put a stamp on their invoice indicating that they should receive their money within 14 days. Mr Kirner continued:

> I have heard anecdotal evidence that if you put that stamp on the document you will not get work. I have also heard someone say they have been contacted by a government official, saying, 'Do not put the stamp on our one either.' I do not know if they were joking or not.[19]

9.23 Intimidation appears to occur in Tasmania as well. Mr. Dale Webster, Director of Building Control, Tasmanian Department of Justice, acknowledged that, in some cases, 'parties may be reluctant to enforce their rights' under the Act. Mr Webster explained that this reluctance may be:

> …due to a perceived or actual outcome of a souring of the commercial relationship between the parties which can lead to a breakdown of an

16 *Official Committee Hansard*, 21 September 2015, p. 4.

17 *Official Committee Hansard*, 21 September 2015, p. 4.

18 *Official Committee Hansard*, 21 September 2015, p. 4.

19 *Official Committee Hansard*, 21 September 2015, p. 25.

> effective relationship during the course of the building work or a lack of repeat business between the parties.[20]

9.24 Mr Andrew Wallace, a Queensland barrister who conducted a 2014 review of the Queensland SOP, considered that a 'culture of fear' exists in the industry.[21] This view was supported by Mr Jonathan Sive,[22] and the experiences of Mr. Graham Cohen, Manager of TC Plastering. Mr Cohen explained to the committee that his decision as a subcontractor to use the Queensland SOP Act rested, in part, on the likelihood that his business would receive future work from the recalcitrant company:

> The Building and Construction Industry Payments Act 2004 is limited in what it can do. It was said this morning that you do it at your own risk of losing clients. We have used it successfully a couple of times, but both of those people were interstate builders we did not think we would ever get a job from again, so it was fine.[23]

9.25 Mr Michael Chesterman, QBCC, agreed that subcontractors may feel at times that it is prudent not to enforce their rights under the SOP Act. However, Mr Chesterman considered that the SOP Act was effective in 'a very difficult area' marked by 'a lot of aggro around payments'.[24]

9.26 Adjunct Professor Philip Evans also considered that intimidation and retribution in relation to use of SOP Acts occurs in Western Australia. In conducting a review of the WA SOP Act, Adjunct Professor Evans heard from many subcontractors:

> One submission told me that when they were contracting for work they had to fill out a section that said: 'Have you ever used the security of payment legislation?' Naturally enough, they found that to be intimidatory. Another person said to me that they had been told that if they appeared before me they would not get any work from that unnamed contractor.[25]

9.27 These experiences were confirmed by Mr Mick Buchan, Secretary CFMEU WA. Mr Buchan explained that no subcontractor he contacted was willing to give evidence to the committee:

> You are finding that those mid-range, decent subcontractors are in such a position that they are very wary or hesitant and will not give on-record evidence…for fear that the builders or principal contractors just will not touch them.[26]

9.28 Mr Ross McGinn Junior reiterated these experiences. Mr McGinn explained that Acrow Ceilings did not use the SOP protections against John Holland because

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20 Correspondence to the committee from Dale Webster, Director of Building Control, p. 2.

21 *Proof Committee Hansard*, 4 November 2015, p. 36, p. 39.

22 *Official Committee Hansard*, 31 August 2015, pp. 18–19.

23 *Official Committee Hansard*, 31 August 2015, p. 21.

24 *Official Committee Hansard*, 31 August 2015, p. 34.

25 *Proof Committee Hansard*, 26 October 2015, pp. 5–6.

26 *Proof Committee Hansard*, 26 October 2015, p. 13.

'nobody wants to get into business with someone they think is a liability'.[27] He continued:

> You would not dare take one of these builders to court, for fear that they turn it back around and make you public enemy number 1. You would never work again. You would never receive a contract and your name would be mud if you dragged these people out into the media and showed what they had done.[28]

9.29 Mr Rob Nolan, a subcontractor from Perth, tried to explain the situation from the position of a head contractor:

> Imagine if you were in their shoes. They are in business. They would see you as a disloyal contractor…If I were in their situation, I would not be hiring a guy who was taking me to court or ruining my reputation.[29]

9.30 Witnesses suggested two approaches that could be taken to stamp out instances of intimidation and retribution. Each approach involves fomenting cultural change in the industry and, in the words of Mr Christopher Rankin, making the SOP Acts 'part of a normal business process'.[30] This is an important point. Many witnesses before the committee reiterated that intimidation, retribution and the climate of fear that pervades the industry, will dissipate only if the SOP Acts are utilised universally.[31] Mr Wallace explained:

> The less the industry uses the particular legislation, then yes; that does engender the possibility of fear amongst subcontractors because, if my competitor subcontractor over here does not use the legislation, then I might be scared or fearful to use it. But if everybody is using it because that is the culture…you remove that culture of fear.[32]

9.31 The first proposal was submitted by Mr Chapman. Mr Chapman informed the committee that he is currently looking at potential recommendations to the South Australian SOP Act in response to the Moss Review. Without prejudging any eventual recommendation, Mr Chapman stated that one of the areas he is looking at concerns making it a criminal offence to 'intimidate a participant in the building industry in relation to the use of the Act'.[33] The effectiveness of this legislative change would obviously be linked to its enforcement.

9.32 Several witnesses who considered that prosecution would not be appropriate proposed a different type of reform, suggesting that procurement could be used as a tool to normalise SOP Acts and reduce intimidation and retribution concerning their

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27 *Proof Committee Hansard*, 26 October 2015, p. 19.

28 *Proof Committee Hansard*, 26 October 2015, p. 20.

29 *Proof Committee Hansard*, 26 October 2015, p. 30.

30 *Official Committee Hansard*, 21 September 2015, p. 17.

31 See, for example, Mr Len Coyte, Director, Masonry Contractors Association of NSW & ACT, *Proof Committee Hansard*, 4 November 2015, p. 53.

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

33 *Official Committee Hansard*, 21 September 2015, p. 6. See also Mr. Robert Gaussen, Adjudicate Today, *Official Committee Hansard*, 21 September 2015, p. 62.

use. Mr Robert Gaussen, owner of Adjudicator Today—an Authorised Nominating Authority under the SOP Acts—explained that government should refuse to tender with businesses involved in intimidation:

> …the Small Business Commissioner [should] convene a meeting of the MBA, HIA and Property Council people and have the minister come in and say: 'Welcome, all of you. By the way, if there is any victimisation or discrimination of use of SOPA you will be wiped off our list of preferred contractors for government construction.'[34]

9.33 Mr Gaussen continued, arguing that 'procurement is an extremely powerful tool' in creating cultural change within the industry.[35]

Committee's views

9.34 The committee is very concerned at evidence put to the inquiry that participants in the construction industry face intimidation and retribution from principal contractors when seeking to enforce their rights under SOP Acts. This is anathema to an open and competitive industry. The committee considers that regulators and government departments and agencies responsible for the SOP Acts need to take a more proactive role in ensuring that all participants in the Australian construction industry are comfortable relying on their statutory rights.

9.35 The committee appreciates that procurement may be a powerful tool to reduce intimidation in the industry. However, the committee is concerned that this approach raises significant issues of procedural fairness. Therefore, the committee considers that the better approach may be to reform SOP Acts to make it a criminal offence to intimidate individuals who seek to rely on their rights under the Act.

Recommendation 24

9.36 The committee recommends that it be made a statutory offence to intimidate, coerce or threaten a participant in the building industry in relation to the participant's access to remedies available to it under security of payments legislation.

Enforcement costs

9.37 Although the adjudication system under the SOP Acts is supposed to be quick and cheap, the committee heard that, in some cases, individuals who sought to enforce their rights under the relevant payment system faced additional difficulties. In particular, the cost of enforcement remains a significant impediment to participants in the industry from exercising their rights.

9.38 The cost of enforcement is borne directly by subcontractors. In some states, there are two avenues available to unpaid subcontractors seeking recovery of monies owing to them—either from a contractor directly above them in the chain, or, in

34 Mr. John Chapman, South Australian Small Business Commissioner, *Official Committee Hansard*, 21 September 2015, p. 62. See also *Official Committee Hansard*, 21 September 2015, p. 2.

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

limited circumstances, from the principal contractor. In other jurisdictions, subcontractors are able only to claim from a contractor directly above them.

9.39 Both approaches are fine in theory. However, as Mr Dave Noonan informed the committee, each avenue represents considerable effort and financial outlay on the part of the subcontractor to comply with the relevant adjudication and (perhaps ultimately) court processes:

> As most subcontractors in the industry are relatively capital poor and rely on cash flow for their business survival, they are put into a very uneven bargaining situation with the head contractor and, in many cases, their only recourse is to go to the courts, which is a long and difficult process and one in which subcontractors are often ill equipped to match the might of the larger companies.[36]

9.40 The committee heard of subcontractors who entered or faced liquidation as a result of spiraling costs.[37] For example, Miss Rachel Prater, Director of Prater Kitchens, considered that the SOP Act fails subcontractors in this position. Miss Prater explained that the expected cost involved in exercising her rights under the South Australian SOP Act to delayed payments, meant that she ultimately decided against using legislation designed for this purpose:

> …we went to the adjudication process through the Security of Payments Act. They were actually quite helpful, but there was just more money to be thrown away and the risk that, if I had not submitted the payments of security act correctly—[38]

9.41 Paradoxically, subcontractors who engage legal advice in order to seek payments due often emerge less well off than subcontractors who cut their losses. This is because larger companies and contractors are able to string-out court action until the small subcontractor becomes insolvent or ends the legal action. Instead of merely losing the original debt, the subcontractor has also been left with a sizeable legal debt. This occurred to Mr Heath Tournier, a subcontractor from Perth:

> Pindan owe me $786,465, not including legal fees or interest. Initially, we tried to contact the building commission to make a claim [under the SOP Act] but we were told that the time period had lapsed and that we should seek legal advice…In the end, I did seek legal advice. However, because of the huge amount of money that I was owed, I could not afford to pay the fees. Pindan knew this and dragged it out. This was a David and Goliath-type battle, and we were bullied out of it.[39]

9.42 Pindan rejected the allegations raised by Mr Tournier.[40]

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36 *Official Committee Hansard*, 12 June 2015, p. 4.

37 See *Official Committee Hansard*, 12 June 2015, pp. 21, 33–34

38 *Official Committee Hansard*, 21 September 2015, p. 42.

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

40 Private correspondence to the committee from Mr Tony Gerber (Pindan) (received 20 November 2015).

Committee's views

9.43 The committee acknowledges the significant costs that subcontractors may face when seeking to enforce their rights under the relevant SOP Act and that these costs act as a significant disincentive to access the remedies that are available under the legislation. The committee considers that national harmonisation, and improved education, awareness and support surrounding the operation of the SOP Acts may go some way to ameliorating these problems. This is addressed below.

Education and support

9.44 A major issue concerning the SOP Acts identified by witnesses before the committee revolves around industry participant's knowledge and understanding of their rights and obligations under the relevant Act. The scale of this problem is significant, as it appears that, in some cases, knowledge of even the *existence* of SOP Acts is low. It goes without saying that if subcontractors are unaware of their rights under, or even the existence of, SOP Acts, the legislation will not be effective.

9.45 The fragmented nature of SOP legislation in Australia may contribute to this lack of awareness. Tables 8.1–8.3 in chapter 8, which detailed the—sometimes significant—distinctions between each jurisdictions' approach, is suggestive of this view. Certainly many witnesses before the committee noted that the complex, technical and time-critical requirements is liable to confuse individuals.[41]

9.46 Mr Dale Webster explained that there has been 'good use' of the Tasmanian SOP Act but that under-utilisation remains a problem. In Mr Webster's view, the 'main impediments to the use of the Act for smaller contractors appear to be a general lack of awareness about its existence, correct operation, or benefits which it bestows'.[42]

9.47 Mr Webster noted some participants fail to use the Act because:

- there is confusion or a lack of understanding and awareness within the industry about the availability of reliance on the Act to ensure progress payments are made; and
- anecdotal information received that some professionals, particularly building surveyors, are not using the Act because of an incorrect understanding that it can only be used by builders.[43]

9.48 Adjunct Professor Philip Evans considered that the Western Australian Construction Contracts Act has made a 'significant impact' but is 'underutilised'.[44] Adjunct Professor Evans' review makes clear that this is a consequence of a lack of awareness among industry participants:

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41 See, for example, Mr. Chris Rankin, Executive Director, AMCA, *Official Committee Hansard*, 21 September 2015, p. 4.

42 Correspondence to the committee from Mr Dale Webster, Director of Building Control, p. 2.

43 Correspondence to the committee from Mr Dale Webster, Director of Building Control, p. 2.

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

> There were two things that worried me throughout this review: firstly, the smaller subcontractors just simply being ignorant of their rights and obligations under contract; and, secondly, being unaware of the existence of what is quite a good piece of legislation.[45]

9.49 Mr Chris Rankin, Executive Director AMCA, agreed with Adjunct Professor Evans. Mr Rankin considered that the most pertinent issue concerning the SOP Acts is one of education and support. In Mr Rankin's opinion:

> At the end of the day, smaller subcontractors are not well-educated in the process of making claims anyway. I think that is generally accepted, and I would extend that to some of my own members.[46]

9.50 Mr Rankin continued:

> The security of payment process is not simple. It is a process—and you can go through the steps—but for a smaller person when they look at the process they really do need somebody on their side.[47]

9.51 Mr Edward Sain concurred, contending that there 'is not a high level of sophistication' among many participants within the industry concerning security of payments. Mr Sain continued: 'It is very difficult for not so well-educated people to understand, and it is hard. A lot of these people are just hard-working tradesmen'.[48] Mr Bob Gaussen also linked the effectiveness of security of payments legislation with education and support. Mr Gaussen contended that the SOP Act in South Australia is not efficient because 'the state government has not given any support, education or promotion to [it]'.[49]

9.52 This view was supported by evidence before the committee. The committee heard from many subcontractors who had little knowledge about the intricacies of the SOP Act or confidence in relevant legislation protecting their rights.

9.53 Mr Roddy Higgins, a cleaning subcontractor in Adelaide, explained that when Tagara became insolvent and failed to pay a $50,000 debt owed to his company he did not seek out support from the South Australian Small Business Commissioner or the SOP Act. Instead, Mr Higgins focused on looking for more business in order to try and carry on operating. He noted that 'as a sole entity it is difficult to run your business and do all the admin that goes with it'.[50]

9.54 Miss Rachel Prater explained that the process when making a claim under the SA SOP was difficult and confusing. In Miss Prater's case, it took 'maybe a week or two to actually read the legislation, to understand it and to write up templates for the

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45 *Proof Committee Hansard*, 26 October 2015, p. 4.

46 *Official Committee Hansard*, 21 September 2015, p. 14.

47 *Official Committee Hansard*, 21 September 2015, p. 14.

48 *Official Committee Hansard*, 21 September 2015, p. 46.

49 *Official Committee Hansard*, 21 September 2015, p. 57.

50 *Official Committee Hansard*, 21 September 2015, p. 21.

payments claim'.[51] Miss Prater continued: 'We, honestly, need a PhD to be able to serve them with the act'.[52]

9.55 Witnesses were clear that responsibility for providing education, awareness and support for industry participants should lie with the relevant agency responsible for monitoring the SOP Act.[53] Table 9.1 below illustrates the relevant agencies.

Table 9.1: Government departments and agencies responsible for SOP legislation

Jurisdiction	Act	Government department of agency responsible
NSW	*Building and Construction Industry (Security of Payment) Act 1999*	NSW Fair Trading
Victoria	*Building and Construction Industry Security of Payment Act 2002*	Victorian Building Authority
Queensland	*Building and Construction Industry Payments Act 2004*	Queensland Building and Construction Commission
WA	*Construction Contracts Act 2004*	Building Commission
NT	*Construction Contracts (Security of Payments) Act 2004*	Building Advisory Services
SA	*Building and Construction Industry (Security of Payment) Act 2009*	Office of the Small Business Commissioner
Tasmania	*Building and Construction Industry Security of Payment Act 2009*	Building Standards and Occupational Licensing
ACT	*Building and Construction Industry (Security of Payment) Act 2009*	Environment and Planning Directorate

9.56 While witnesses generally did not provide prescriptive examples of education campaigns or other awareness activities, one suggestion was considered useful. Miss Rachel Prater agreed that a disclosure statement on a standard form contract stating that in the event of a payment dispute a party to the contract may be able to rely on the relevant SOP Act, and could call a number for assistance, would have made a difference to her dispute.[54]

9.57 Mr. Webster informed the committee that the Tasmanian Government has introduced measures to encourage greater uptake of the Act. These include, in

51 *Official Committee Hansard*, 21 September 2015, p. 43.

52 *Official Committee Hansard*, 21 September 2015, p. 39.

53 Adjunct Professor Evans considered that it is 'clearly incumbent on the Commissioner to ensure that all levels of the construction industry are aware of the provisions of the Act': *Proof Committee Hansard*, 26 October 2015, p. 2. See also Mr. Chris Rankin, Executive Director, AMCA, *Official Committee Hansard*, 21 September 2015, p. 15: 'I would see that the biggest remit that the Small Business Commission has is educating people and assisting in the process to make a claim'. See also Mr Robert Gaussen, Adjudicate Today, *Proof Committee Hansard*, 21 September 2015, p. 57.

54 *Official Committee Hansard*, 21 September 2015, p. 43.

collaboration with major industry associations, facilitating training events and the development of a website and brochure.[55]

Committee's views

9.58 The committee is concerned at the lack of understanding among industry participants of their rights and obligations under SOP Acts. If subcontractors remain ignorant of their rights the SOP Acts will not be effective.

9.59 The committee acknowledges that subcontractors are not lawyers and may not appreciate the requirements under the SOP Acts. This is all the more reason for the agencies responsible for the management of these Acts to conduct education campaigns informing subcontractors of their rights and provide logistical support for subcontractors seeking to make a claim. It is also a sound reason to address claims made repeatedly by subcontractors in the course of this inquiry that they often face retribution from head contactors for pursuing their rights under SOP legislation.

9.60 The committee considers further that national harmonisation of SOP legislation may contribute to greater understanding of their rights and obligations among all participants within the industry. This will be addressed below.

Recommendation 25

9.61 The committee recommends that state government departments and agencies responsible for the relevant security of payments act provide education, awareness and support for industry participants who may wish to access remedies available to them under the relevant legislation.

Recommendation 26

9.62 The committee recommends that industry groups should also be proactive in educating and training members on the relevant payment systems. This should include streamlining complaints and dedicated help lines.

Authorised Nominating Authorities

9.63 One of the major distinctions between the East Coast and West Coast models is the position of Authorised Nominating Authorities (ANAs). Under the East Coast model, claimants apply for adjudication of a payment dispute through an ANA, which then refers the dispute to a nominated adjudicator selected by the ANA; whereas under the West Coast model, the parties agree to an adjudicator.

9.64 As noted above, Mr Andrew Wallace, who conducted a review of the Queensland SOP Act, considered that this process could give rise to two problems: an apprehension of bias on behalf of the adjudicator, and the prospect of intimidation and retribution connected to the appointment of particular adjudicators. As such, Mr Wallace recommended that ANAs be abolished and their function be transferred to a newly established Adjudication Register based in the QBCC. The Adjudication Register now appoints all adjudicators. This recommendation was subsequently enacted by the Queensland government.

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55 Correspondence to the committee from Dale Webster, Director of Building Control, p. 2.

9.65 This amendment has been controversial. In particular, Mr Robert Gaussen, the owner of an ANA, maintained that ANAs provided an important education and support service for subcontractors seeking to enforce their rights under the SOP Act.[56] As the previous section illustrated, education and support is critical in ensuring the effectiveness of any SOP regime. Any reform that reduces support services for subcontractors should be examined closely. This section explores both Mr Wallace and Mr Gaussen's contentions. It first provides some brief background on ANAs.

9.66 Under the previous Queensland legislation, both ANAs and adjudicators were required to meet certain qualifying criteria in order to be registered. Persons acting in both roles were 'not required to be legally trained'.[57]

9.67 ANAs can be split into two discrete categories—membership based organisations and for-profit private companies. ANAs receive financial benefit from taking a proportion of an adjudicator's fee. The fees of the private for-profit companies are substantially higher than those of the membership based organisations. Mr Wallace informed the committee that he was aware of ANAs charging 33 per cent of an adjudicator's fee,[58] while retired District Court Judge Alan Moss, who reviewed the South Australian SOP Act, identified that some ANAs charge up to 40 per cent of the adjudicator's fee.[59]

9.68 It is clear that the process of appointment may give rise to an apprehension of bias. As Judge Moss explained, a claimant is 'likely to choose an ANA which has a track record of providing favourable claimant outcomes. For the same reason an ANA is likely to appoint an adjudicator with a pro-claimant bias'.[60] Mr Wallace believed that the ANA model 'leaves open the risk of apprehended bias at best and, at worst, it is a model which is susceptible to corruption or corrupt practices'.[61] Mr Wallace considered this unacceptable; 'adjudicators should act impartially and they should be appointed independently of their own interests or the interests of a particular sector within the industry'.[62]

9.69 Mr Wallace also noted that the ANA model can give rise to instances of intimidation in the appointment of adjudicators. He considered that there was a 'very unhealthy connection between ANAs and "claims preparers"'—that is, a person who prepares claims for, or acts on behalf of a claimant or respondent. Mr Wallace explained that he received 'numerous submissions' from lawyers, adjudicators and ANAs that indicated that 'claims preparers were putting the heat on them to appoint particular adjudicators or, conversely, not to appoint particular adjudicators':

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

57 *Proof Committee Hansard*, 4 November 2015, p. 37.

58 *Proof Committee Hansard*, 4 November 2015, pp. 37, 42.

59 Alan Moss, *Review of Building and Construction Industry Security of Payments Act 2009* (SA), p. 9. Cited in QBCC, *Submission 19.1*, p. 1.

60 Alan Moss, *Review of Building and Construction Industry Security of Payments Act 2009* (SA), p. 9.

61 *Proof Committee Hansard*, 4 November 2015, p. 38.

62 *Proof Committee Hansard*, 4 November 2015, p 37.

> I was told stories about claims preparers telling ANAs, 'If you appoint Jones to this dispute that I'm prepared to give you now, you'll never get another application from us again.' That is very significant. That is adjudicator shopping; it is trying to manufacture a result.[63]

9.70 Mr Robert Gaussen, owner of Adjudicate Today, acknowledged that as an owner of a now-abolished ANA he had a vested interest in the reforms, but nonetheless considered the amendments a 'complete and total disaster'.[64] Mr Gaussen took issue with the Adjudication Registrar's power to appoint adjudicators, noting that adjudicators believe that the Adjudication Registrar discriminates against them in the nomination of matters if they are critical of his actions.[65]

9.71 Mr Gaussen was also particularly concerned with the abolition of ANAs, arguing that this reform 'removed the support structure to industry participants'. Mr Gaussen continued:

> Effective security of payment means there has got to be proper education, there has got to be government support and there has got to be a place where people can go to get advice on how to make use of the act. We have a website: adjudicate.com.au. People can go to that site, they can get advice and they can phone our staff. The staff are responsible, under the statute, for helping them go through the process—not for the merit of their argument but for complying with the act. We have staff and I have invested millions of dollars in their training for the provision of this advice, to help people through the process.[66]

9.72 Mr Gaussen demonstrated the consequence of the removal of this support structure by detailing statistics from the Adjudication Registrar on the 'fall over rate'. That is, the ratio between decisions released and applications withdrawn. In the five months prior to the amendments, the fall over rate across all ANAs was one-third. In contrast, in the seven-month period between December 2014 (when the amendments came into force) and 30 June 2015, the fall over rate was 87.5 per cent.[67] In further statistics provided to the committee, Mr Gaussen indicated that in the three month period July to September 2015 the fall over rate has increased to 94 per cent.[68] Mr Gaussen argued that the significant increase in the fall over rate is due to the abolition of the ANAs and the support structure that they provided.

9.73 Mr Chesterman, Adjudication Registrar, QBCC, suggested that there is no direct causal relationship between an application being withdrawn and evidence of applications or the process falling over. Mr Chesterman noted that an application may be withdrawn for many reasons, including:

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63 *Proof Committee Hansard*, 4 November 2015, p. 42.

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

65 Adjudicate Today, *Submission 26*, p. 4.

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

67 *Official Committee Hansard*, 21 September 2015, p. 59.

68 Adjudicate Today, *Submission 26.1*, p. 6.

- if the matter is settled to the satisfaction of the claimant before the adjudication process begins; or
- if the Registry identifies jurisdictional issues concerning the application, allowing the claimant to rectify the issue(s) and recommence the process at a later date.[69]

9.74 Mr Gaussen rejected this position. In Mr Gaussen's view, these reasons 'have existed since the first adjudication application was made in 2004'. As such, the 'only possible reason for such a huge increase in the fall over rate' is the removal of the support structure provided by the ANAs.[70] Mr Chesterman maintained that the QBCC 'provides a wide range of free advice to claimants and respondents'.[71]

Committee's views

9.75 The committee did not hear enough evidence to determine whether the increase in fall-over rate in Queensland adjudications is a result of the abolition of ANAs. However, the committee is concerned that any reduction in support services and education may detract from the ability of subcontractors to enforce their rights, and therefore detract from the effectiveness of SOP Acts generally. The committee notes that it has already recommended that State and Territory regulators, as well as industry groups, provide education, training, awareness and support for industry participants seeking to rely on their rights under the SOP Acts.

9.76 The committee emphasises that it is critical to the effectiveness of SOP legislation that adjudicators are, and are seen to be, independent. The committee notes with concern that requiring ANAs to appoint an adjudicator, may give rise to an apprehension of bias. All adjudicators should be independent, impartial and qualified for their position.

Recommendation 27

9.77 The committee recommends that adjudicators of payment disputes under the relevant security of payments act should be required by law to be independent and impartial.

Adjudication timelines

9.78 As noted in chapter 8 and illustrated in tables 8.1–8.3, significant differences exist between each state and territory's SOP Act. In particular, the speed of adjudication differs considerably —from when an application for adjudication can be lodged, to when a response is required, to when a decision must be made. This section explores two connected problems: the period in which a claimant can serve an application for adjudication; and the period in which a decision must be made.

9.79 This report has reiterated the importance of timeliness in ensuring that SOP Acts are effective. SOP Acts are designed to keep cash flowing down the contractual

69 QBCC, *Submission 19.1*, p. 5.

70 Adjudicate Today, *Submission 26.1*, p. 3.

71 QBCC, *Submission 19.1*, p. 2.

chain. Therefore, the entire process must be quick and expeditious—but, equally, there must be enough time for a claimant to apply for an outcome.

9.80 Generally speaking, under the East Coast models, to apply for adjudication a claimant has either 10 or 20 business days after receiving a payment schedule or the due date for payment passes, and depending on 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 after notifying both parties that the adjudicator has accepted the application, or after receiving the respondent's reply.

9.81 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. This causes difficulties for many subcontractors who may not appreciate the requirements under the Act. The committee heard from Mr Heath Tournier, a Perth subcontractor, who explained that a company he was in a payment dispute with relied on his ignorance of these requirements to avoid paying money owed to Mr Tournier:

> Pindan owe me $786,465, not including legal fees or interest. Initially, we tried to contact the building commission to make a claim but we were told that the time period had lapsed and that we should seek legal advice. Pindan strung us out to bypass the 28 days, or whatever it was back then. I cannot remember.[72]

9.82 As a result, Mr Tournier could not force Pindan to adjudication, and the SOP Act was useless for him. Pindan rejected the allegations raised by Mr Tournier.[73]

9.83 In discussing the period in which a payment claim should be able to be served—not an adjudication application—Mr Andrew Wallace explained why a 28-day period was too short. Mr Wallace's reasoning accords with the experience of Mr Tournier:

> When parties are in a building dispute they do not know that they are in a building dispute straight away. You put in your claim and, quite often, you will hear nothing from a head contractor or they might put in a payment schedule, but you do not know that you are in a dispute. Certainly within 28 days it is rare to know that you are in a dispute.[74]

9.84 Difficulties also exist in the time period in which an adjudicator must make his or her decision. The recent Queensland amendments, noted above, reformed the Queensland SOP Act into a two-tier model. A payment dispute above $750,000 is now classed as a 'complex' payment claim, while any dispute less than $750,000 is a 'standard' payment claim.[75] As table 8.3 in chapter 8 noted, parties involved in a

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

73 Private correspondence to the committee from Mr Tony Gerber (Pindan) (received 20 November 2015)

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

75 *Building and Construction Industry Payments Act 2004* (Qld), s 9; Schedule 2.

complex claim are granted more time to respond to an application for adjudication, and an adjudicator is permitted an extended period to decide such a claim. Significantly, the total timeframe permitted for the adjudication of complex disputes—that is, from delivery of a payment claim to delivery of an adjudicator's decision—is now considerably lengthier; increasing from 35 to 75 business days (plus up to an additional 15 business days if approved by the adjudicator). This can stretch up to 18 weeks.

9.85 Mr Robert Gaussen, owner of Adjudicate Today, considered that this amendment destroys the 'secret of the success of security of payment legislation'. Mr Gaussen explained that 'if you are not quick in getting the money flowing through the industry, the whole thing is rendered ineffective. The Queensland amendments made all of those claims above $750,000 extremely slow'.[76] Mr Gaussen continued:

> Please remember that the decision by the adjudicator is not final; it is only interim. No-one in their right mind who is legally qualified or familiar with this legislation could recommend to their client that they go to adjudication for a claim over $750,000, which will take more than six months to resolve, and the decision is interim, not final. It is a ludicrous proposition, because everyone will have fallen over three months earlier. The bank guarantees and warranties fall over after three months. You have got to get it resolved within three months; otherwise it is rendered completely ridiculous nonsense.[77]

9.86 In Mr Gaussen's opinion, the result of the Queensland legislation is that 'claims over $750,000 are not being made'.[78] Mr Michael Chesterman, QBCC, disputed Mr Gaussen's position. While acknowledging that at least one complex dispute took 94 business days to resolve, Mr Chesterman explained that the 'average time for complex claims to be decided…is 44 business days from the date of lodgement'.[79] Mr Chesterman did not, however, provide the number of complex claims made.

Committee's views

9.87 The committee appreciates the importance of finality in contractual disputes and understands the need to place a time limit on when an application for adjudication can be made. However, the committee considers that an arbitrarily narrow timeframe is inequitable as it allows larger, more powerful companies to avoid being placed under the SOP regime by manipulating subcontractors unaware of their legislative rights. In this regard, the committee considers that 28 days is too short.

9.88 The committee considers further that the time period in which a claimant can apply for adjudication under security of payments Acts should equitably balance the twin considerations of enabling parties an opportunity to raise a claim and the principle of finality of disputes.

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

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

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

79 QBCC, *Submission 19.1*, p. 3.

The problem of insolvency

9.89 A further problem arises for subcontractors pursing payments when the head contractor becomes insolvent and enters into administration. As discussed in chapter 2, subcontractors are not considered priority unsecured creditors and thus receive funds last-in-line. However, insolvency also affects enforcement proceedings that subcontractors may have begun in court. Under s 440F and s 471B of the Corporations Act, no enforcement process in relation to the property of a company can commence or proceed, except with leave of the Court. If the Court does give leave, then the enforcement process must be undertaken in accordance with such terms (if any) as the Court imposes.

9.90 The problem here is that the NSW Supreme Court has held that the operation of the *Contractors Debts Act* in the case of insolvent head contractors, could give the unpaid person priority over other creditors. That would be inconsistent with the general scheme of the Corporations Act providing for the administration of companies or the liquidation of companies.[80]

9.91 The Victorian Supreme Court reached the same conclusion in *Belmadar Constructions Pty Ltd v Environmental Solutions International Ltd.*[81] In that case, the subcontractor had an entitlement to a judgment for a progress payment, under the *Building and Construction Industry Security of Payment Act 2002* (Vic). Belmadar wished to enforce its rights against the head contractor, under legislation which was similar to the NSW *Contractors Debts Act*. However, the Court took the view that the subcontractor should not be given leave for that purpose because:

> It is important that once the processes for an orderly management and winding up of the affairs of a company in financial distress are set in train that the statutory rights of and limitations upon the rights of all concerned, including unsecured creditors under the Corporations Act 2001, be respected and given effect to.[82]

9.92 Essentially then, even if the subcontractor has carried out the process that would give him, or her, the right to recover from the principal contractor, the Court may not allow those rights to be enforced if the head contractor enters into insolvency. The magnitude of this problem takes on greater cadence when the incidence and scale of insolvency in the construction industry is recalled.

Committee's views

9.93 The committee acknowledges that insolvency events can place further pressures on all contractors linked to the failed business. However, the committee understands the long-established principle that secured creditors take precedence over unsecured creditors and does not consider that recommending changes to the general scheme under Part 5.3A of the Corporations Act is an appropriate step at this time.

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80 *Modcol v National Buildplan Group* [2013] NSWSC 380, [25]–[26] (McDougall J).

81 [2005] VSC 24.

82 *Belmadar Constructions Pty Ltd v Environmental Solutions International Ltd* [2005] VSC 24, [17].

No national security of payments Act

9.94 The previous sections highlighted a number of significant concerns besetting security of payment acts in Australia. While some of these are enduring problems, such as the difficulty individuals have in enforcing payment from insolvent individuals, many could be resolved by a harmonised, national security of payment Act. While the current approach encourages diversity and experimentation, enabling jurisdictions to cherry-pick successful elements of other SOP Acts, evidence before the committee suggests that uniformity would offer more significant advantages—including to those operating intrastate. In particular, a national SOP Act could reduce costs and increase use.

9.95 Jeremy Coggins has noted that the existence of two distinct models as well as some variations between Acts of the same model produces inconsistencies resulting in unfamiliarity for participants operating interstate. Coggins explained:

> Such unfamiliarity, in turn, may result in parties incurring extra costs in familiarising themselves with differences in interstate legislation, or parties being unaware and/or confused as to their statutory rights with respect to payment for construction work which, in turn, may affect compliance with the relevant legislation.[83]

9.96 In an industry where some participants are unaware of, or already struggle to comprehend, their rights, it makes little sense to retain eight different SOP regimes. Although the committee did not hear evidence to suggest that subcontractors who operate in two or more jurisdictions have difficulties in enforcing their statutory rights across state borders, it is likely to be the case. Indeed, this position can be gathered by the uniform agreement among witnesses to this inquiry that SOP legislation should be harmonised. Furthermore, Adjunct Professor Evans informed the committee that respondents to his review 'uniformly' favoured a national approach.[84]

9.97 Moreover, the original and continuing driver for the SOP Acts and SOP reform is the incidence and scale of insolvency in the construction industry. As scholars have recognised, 'the Commonwealth is the only level of government which can legislate comprehensively in relation to insolvency'.[85]

9.98 Finally, in light of the national nature of the Australian construction industry, there does not appear any cogent reason for the current fragmented regulatory approach. In its final report, the Cole Royal Commission considered 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

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83 Jeremy Coggins, 'A Review of Statutory Adjudication in the Australian Building and Construction Industry, and a Proposal for a National Approach' (RICS COBRA Research Conference, University of Cape Town, 10–11 September 2009), p. 2.

84 *Proof Committee Hansard*, 26 October 2015, p. 3.

85 Matthew Bell and Donna Vella, 'From motley patchwork to security blanket: The challenge of national uniformity in Australian "security of payment" legislation' (2010) 84:8 *Australian Law Journal* 565, p. 577.

Territory'.[86] Indeed, as the Society of Construction Law Australia noted, 'there are no evident differences in the conditions relating to the construction industry between the States, so as to justify any State by State treatment'.[87]

9.99 Three mechanisms to achieve uniformity in SOP legislation exist, though none is without its problems. The mechanisms are:

- amendment of each State and Territory's SOP legislation to adopt a uniform model;
- referral of powers by the States to the Commonwealth pursuant to s 51(xxxvii) of the Constitution; and
- unilateral legislation by the Commonwealth relying on its various heads of constitutional power, in particular the corporations' power and the interstate trade and commerce power.

9.100 The Society of Construction Law Australia considered that political reasons make the first two options unfeasible. The Society noted:

> It is unlikely that the issues raised by the legislation are sufficiently significant to attract a referral of powers. Recent experience with the implementation of the new model Commercial Arbitration Act has shown how difficult it is to achieve uniform rapid implementation of new legislation.[88]

9.101 For these reasons, the Society argued that the third option is the best approach.[89] However, this mechanism is complicated by the fact that it is unlikely to achieve universal coverage. As the Cole Royal Commission found, the Commonwealth's legislative power under ss 51(i) and 51(xx) of the Constitution would 'extend to regulating any transaction in which at least one of the businesses is incorporated',[90] but would not apply to intrastate transactions between non-incorporated individuals. The Society of Construction Law Australia explained that while it is not clear how many individuals would fall outside the putative Commonwealth legislation, it is unlikely to be a significant number. The Society argued that, in any case, 'some loss of coverage is an acceptable price to pay for' implementation of national legislation.[91]

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86 *Final Report of the Royal Commission into the Building and Construction Industry: Volume 8 Reform—National Issues Part 2* (2003), p. 255.

87 Society of Construction Law Australia, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (May 2014), p. 21.

88 Society of Construction Law Australia, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (May 2014), p. 22.

89 Society of Construction Law Australia, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (May 2014), p. 69.

90 *Final Report of the Royal Commission into the Building and Construction Industry: Volume 8 Reform—National Issues Part 2* (2003), p. 260.

91 Society of Construction Law Australia, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (May 2014), p. 22.

9.102 Not all witnesses accepted this position. Mr Wallace agreed that 'it is time for a national model to be developed'. However, Mr Wallace considered that because the Commonwealth does not have the constitutional power to introduce uniform legislation itself, it should instead 'drive reform in this space through COAG'.[92] In contrast to the view of the Society of Construction Law of Australia, Mr Wallace believed that legislation reliant on s 51(xx) of the Constitution (the Corporations power) would exclude a significant number of participants in the industry:

> …my concern with that is that we may face a situation where we have one act…for corporations and then a disparate hodgepodge of acts within all of the legislations for unincorporated bodies. That would obviously concern me greatly because there are many mum and dad building subcontractors out there who are not incorporated and they deserve just as much protection as anybody else.[93]

9.103 As many witnesses reiterated, universal application is critical for the success of any SOP regime. An Act that excludes a substantial number of participants from its operation will not be beneficial.

Committee's views

9.104 The committee accepts the almost unanimous view of participants to this inquiry that harmonisation of SOP legislation offers significant advantages, including reduced costs and the potential for greater utilisation by subcontractors. While the committee appreciates the theoretical benefits that come from experimentation and competitive federalism, the committee considers that—in light of the significant problems noted throughout this inquiry—the time is right to replace the fragmented approach to SOP legislation that currently exists.

9.105 The construction industry is a national industry. Its participants, large and small, routinely operate across state borders. It is absurd that in this day and age there are eight separate SOP regimes which differ markedly from one another. Some of the differences are small while some are large and significant, but what they all do is present manifold difficulties for construction industry businesses that routinely operate in more than one state. This has resulted in a great deal of wasteful litigation in which parallel points of law are raised in the different jurisdictions.

9.106 Witnesses and submitters to the inquiry expressed near universal support for a single set of rules applying around the country for security of payment and related matters in the construction industry. The most effective way of achieving this would be for the Commonwealth to legislate based on the Commonwealth's various heads of legislative power, especially the corporations' power. This approach was adopted by both the Cole Royal Commission and the more recent Society of Construction Law Report on Security of Payment and Adjudication in the Australian Construction Industry.

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92 *Proof Committee Hansard*, 4 November 2015, p. 38.

93 *Proof Committee Hansard*, 4 November 2015, p. 38.

9.107 As both these reports pointed out, there may not be completely universal coverage achieved by Commonwealth legislation. However it would be near enough to universal provided at least one party to a contract is incorporated, such that any marginal loss of coverage relative to State legislation would be an acceptable price to pay for this long-overdue reform.

Recommendation 28

9.108 The committee recommends that following completion of the steps recommended in chapter 10 in relation to Project Bank Accounts on construction projects where Commonwealth funding exceeds $10 million, the Commonwealth enact national legislation providing for security of payment and access to adjudication processes in the commercial construction industry.