Introduction to "Statutory Intervention into the Common Construction Law of Australia — Progress or Regress?"†

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Editor's Note

The depth and breadth of Australia's construction law bar is once again on display in the following paper by Dr. Donald Charrett, Barrister, Arbitrator and Mediator of the Melbourne TEC Chambers, and Matthew Bell, Senior Lecturer and Co-Director of Studies, Construction Law, Melbourne Law School. This study into the Australian approach to the statutory adaption of the common law of construction is particularly fascinating from a Canadian perspective, inasmuch as the common law provinces of Canada, like Australia, derive their common law directly from the common law of England, but have progressively introduced various types of legislation, primarily at the provincial and territorial levels, to modify the common law. In fact, anyone familiar with both the Australian and Canadian law of contracts appreciates that the degree of synchronicity between the two countries, at least in this regard, is remarkable. At the same time, it is apparent from the overview provided by Dr. Charrett and Mr. Bell that the two countries have also organized themselves quite similarly from a constitutional perspective. As well, and highly relevant to the comparative manner in which the development of infrastructure has been managed by Australia and Canada, both countries have been squarely faced with the "tyranny of distance". Where Australia and Canada have diverged, as it pertains to construction law at least, is in their respective legislative approaches to modifying the common law. Having said this, however, the similarities are so great that there is much for Canadian construction lawyers to learn from the Australian experience.

In this regard, there could not be a clearer articulation of the relevant Australian context than that provided by Dr. Charrett and Mr. Bell. Whereas the common law provinces and territories of Canada have opted for construction lien legislation as the primary form of statutory intervention into the field of construction law, and Quebec has a well-developed parallel mecha-

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nism in the legal hypothec, a number of Australian jurisdictions have chosen, relatively recently, to adopt a modified UK adjudication model of statutory security for payment legislation. It is modified from the UK approach in that it is confined to payment disputes. The differences between the "west coast" and "east coast" models of Australian adjudication make for very interesting reading, and provide a useful comparison with regards to the differences between the lien acts of the Canadian common law provinces. At the same time, the Australians have taken a legislative approach to the issue of proportionate liability that is similar, although not identical, to that of the Canadian common law provinces. Where the two countries differ considerably, however, is in respect of the sweeping effect of Australia's introduction of fair trading legislation that applies to all commercial activity, including the building sector. Whereas some Canadian provinces, including Quebec, have introduced limited statutory obligations analogous to those imposed by Australian fair trading legislation, there is really no Canadian equivalent to this far-reaching federal legislation adopted by the Australian Commonwealth, State and Territory Governments. The statutory treatment accorded to misleading or deceptive conduct alone represents a very significant commercial consideration that is absent largely from the Canadian landscape. Perhaps what is most impressive in this regard, however, is the fact that Australian legislators actually developed such a piece of legislation and enacted it successfully across all nine Australian jurisdictions, as is so well described by Dr. Charrett and Mr. Bell. It is difficult to envisage the same process being completed successfully in the Canadian political environment. Importantly, the strengths and weaknesses of each of Australia's various statutory interventions into the common construction law are fully developed for the reader, and a rigorous policy-based assessment is applied consistently throughout.

In short, the Journal is honoured by the opportunity to publish this article as a significant comparative law benchmark for Canadian construction lawyers and policymakers, and Dr. Charrett and Mr. Bell are to be highly commended for their work.

R. Bruce Reynolds

1. INTRODUCTION

Much of Australia's common law does not differ substantially from the common law of England where it originated. Whilst Australia is a federation of six States and two Territories, the High Court of Australia, the country's final court of appeal, has recently fostered the view that not only is there a "common law of Australia" but also that it is "a single and unified one".[1] However, as in any common-law jurisdiction, the legislators of the nine Australian jurisdictions (including the Federal) have intervened to supplement or replace the common law in many areas.

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1 The relevant cases are referred to by, *e.g.*, Paul Finn, "Internationalization or isolation: the Australian *cul de sac*? The case of contract law" in Elise Bant and Matthew Harding (eds.), *Exploring Private Law* (Cambridge University Press, 2010), p 46.

Construction law is no exception to such intervention. The major statutory incursions comprising departures from the common law which are of interest to construction lawyers are:

> (1) "fair trading" legislation (primarily, the *Trade Practices Act 1974* (Cth) and equivalent State and Territory statutes; these have recently been consolidated into the *Australian Consumer Law*);
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> (2) proportionate liability (Federal, State and Territory); and
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> (3) "security of payment" reforms designed to enforce rights to payment across the contractual chain (State and Territory).

This article looks at the origins of each of these legislative schemes, overviews their provisions and their impact on the practice of construction law in Australia, and outlines some of the issues that the legislation has spawned. In particular, the article highlights the differences between legislation in the different jurisdictions, notwithstanding that the local variants of each scheme were essentially promulgated to correct the same mischief.

2. AUSTRALIA'S LEGAL ENVIRONMENT

2.1 Constitutional Structure

Australia is a constitutional monarchy with a federal system of government. There are six States, two Territories (the Northern Territory and the Australian Capital Territory) and the Federal government (Commonwealth of Australia), each of which has an elected Parliament based upon the Westminster system. With the exception of Queensland, which has only one chamber, each Parliament comprises two houses of (almost) equal power which enact legislation on any matter within their constitutional power.

The *formal* Head of State is the Queen of Australia, who is also the Queen of the United Kingdom and of 14 other Commonwealth realms. In practice, the Queen's representatives, the Governor-General (Commonwealth) and Governors (States), exercise her formal powers on a day-to-day basis. Their most important formal power is to sign Acts of Parliament to make them part of the statute law of Australia.

Nowadays, despite the formal constitutional structure, Australia effectively functions more like a republic than a monarchy. Since the *Australia Act 1986* (the name given to two separate Acts that eliminated the remaining associations between the laws and judiciary of Australia and their counterparts in the United Kingdom), the United Kingdom Parliament does not even have a theoretical legislative role to play in Australian affairs. The High Court of Australia is the supreme judicial authority for Australian law; appeals to the Privy Council from all Australian jurisdictions were abolished progressively, with the process ending in 1986. But perhaps more significantly, the *effective* Head of State, the Governor-General of Australia, is nominated by the Australian Government for the formal approval of the Queen. Since 1965, all Australian Governors-General have been Australian born, and it seems inconceivable that this situation would change in the future.

2.2 Federal Division of Legislative Powers

Australia has a written *Constitution*, enacted in 1900 and becoming effective

on 1 January 1901, comprising 128 articles in eight chapters. These cover: the Parliament, the Executive Government, the Judicature, Finance and Trade, the States, New States, Miscellaneous and Alteration of the Constitution.

The *Constitution* was accepted by the people of Australia in a referendum, in which a majority of voters, and the majority of Colonies (as the States then were) approved it as the fundamental law of the Commonwealth of Australia. The Australian constitution was originally an Act of the United Kingdom Parliament. Changes to the *Constitution* require that the Commonwealth Government put any proposed change to the people in a referendum. A majority of the electorate comprising voters across the nation, plus a majority of the electors in a majority of the States, must agree to a change before the *Constitution* can be amended.

This has proved a high bar to overcome: of the44 proposals to change the *Constitution* since 1901, only eight have been passed. What is clear from this track record is that a proposal to change Australia's *Constitution* is doomed unless it is supported by both major political parties, irrespective of which one is in power and proposes the change.

In terms of the split between the legislative power of the Commonwealth and the States, s. 51 of the Australian *Constitution* defines a number of "heads of power" that give the Commonwealth its legislative authority. Some of these powers are exclusive, and some are shared with the States. In respect of the latter however, if the Commonwealth legislation "covers the field", then any State legislation is void to the extent of any inconsistency.[2] Those heads of legislative power not referred to in s. 51 are the exclusive province of the States, and the Commonwealth has no powers to make laws in respect of them. However, over the past century, the legislative bailiwick of the Commonwealth has grown through a combination of favourable interpretations of the s. 51 powers by the High Court (discussed further below), referenda, or the consent of the States and Territories.

Thus, matters including taxation, company regulation and industrial relations are now predominately within the control of the Commonwealth. Nonetheless, there remain a number of important issues of relevance to construction law, over which the States and Territories have exclusive and independent jurisdiction, and the Commonwealth is effectively powerless in respect of them in the absence of State cooperation. The impact of this is considered in more detail below.[3]

In the event of a challenge to the constitutionality of any Act of Parliament, the High Court of Australia is the sole authority. In the 110 years since Federation, the High Court has ruled a number of Acts of Parliament unconstitutional, sometimes with very far reaching effects. For example, s. 51(xx) provides that the Commonwealth has the power to make laws for the peace, order, and good government of the Commonwealth with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". The High Court traditionally construed s. 51(xx) as giving the States the exclusive power to regulate

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2 Section 109.

3 In addition, and for completeness only given that it is not relevant to the key areas discussed in this article, many important matters — such as planning applications — are primarily administered by the third level of Australian governments, municipal or shire councils.

the formation of companies,[4] making the Australia-wide regulation of companies constitutionally difficult. This ultimately led to the States and Territories ceding their constitutional power to regulate the formation of companies in favour of the Commonwealth, with the result that there is now a single *Corporations Act* which applies Australia-wide.

In addition to the *Constitution* of the Commonwealth of Australia, each State also has its own constitution, which is subject to the overarching provisions of the Commonwealth *Constitution*. The differences between the impact of State constitutions was highlighted recently by a construction law case in Victoria. In considering the available grounds of appeal against an adjudicator's determination under the *Building and Construction Industry Security of Payment Act 2002* (Vic), Vickery J. found that the Victorian *Constitution* left open the possibility of an appeal by way of *certiorari*.[5] Such a broad possibility for judicial review stood in contrast to the position which had prevailed in New South Wales since 2004, stemming from *Brodyn*,[6] that review was only available for failure to comply with a "basic and essential requirement" of the equivalent NSW Act; however, the NSW Court of Appeal recently has held the *Brodyn* view no longer to be sustainable in this respect.[7]

2.3 The Legacy of Colonial-Era Divisions

The population of Australia is very small in relation to its area: the total population in March 2010 was 22.3 million, only 0.3% of the world population of 6.83 billion, whereas it is the sixth largest country by land area — 7.69 million square kilometres or 5.2% of the world's total land area. The population is also very unevenly spread: the three largest States on the east coast account for over 77% of Australia's population: New South Wales 7.2 million (32.4%), Victoria 5.5 million (24.8%) and Queensland 4.5 million (20.2%). The three smallest jurisdictions have very small populations: Tasmania 507,000 (2.3%), Australian Capital Territory 358,000 (1.6%) and Northern Territory 228,500 (1.0%).[8]

The impact of separate and (often fiercely) independent State governments, separate legal jurisdictions and the "tyranny of distance" inherent in the physical size of the country, separating population centres from one another as well as Australia from the lawmaking wellspring in London, has long had a pervasive impact on Australian society. In one of the more egregious examples of the inability of governments to agree, Australia had three different rail gauges for main line railways for well over 100 years, resulting in untold economic inefficiency. This sorry situation dated from the 1850s when railways were first built in Australia. Notwith-

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4 See, *e.g.*, *Huddart, Parker & Co. Pty Ltd. v. Moorhead* (1909), 8 C.L.R. 330 (Aus. H.C.).

5 *Hickory Developments Pty. Ltd. v. Schiavello (Vic) Pty Ltd.*, [2009] VSC 156 (Vic. S.C), at [73].

6 *Brodyn Pty Ltd. t/as Time Cost and Quality v Davenport* (2004), 61 N.S.W.L.R. 421 (N.S.W. C.A.).

7 *Chase Oyster Bar Pty. Ltd. v. Hamo Industries Pty. Ltd.*, [2010] NSWCA 190 (N.S.W. C.A.).

8 http://abs.gov.au/ausstats/abs@.nsf/mf/3101.0/ (12 January 2011).

standing that, at the time, each of the separate Colonies was subject to the oversight of the Colonial Office in England, Victoria, New South Wales and Queensland built their first railways to different gauges — Victoria implemented the 5'3" (1600 mm) broad (Irish) gauge in 1854 (followed in 1856 by South Australia), NSW built to the 4'8½" (1435 mm) standard (English) gauge in 1855, and Queensland used the narrow 3'6" (1067 mm) gauge in 1865 for reasons of economy (followed by South Australia in 1871 and Western Australia in 1879).

This disconformity occurred in spite of the Secretary of State for the Colonies urging the use of a standard gauge in 1848, and subsequently agreeing to the use of broad gauge in 1851 (following the urging of the Irish born Chief Engineer of the Sydney Railway Company). However, following a change of chief engineer (to one born in Scotland), the Sydney Railway Company reverted to standard gauge after Victoria and SA had ordered broad gauge rolling stock. Victoria and SA refused to change their orders, and NSW went ahead with standard gauge. The economic consequences of this stubborn adherence of each Colony (now State) to its own perceived interests without regard to the needs of Australia as a whole resulted in an extremely inefficient and costly rail system. After work extending over 50 years and the expenditure of hundreds of millions of pounds (since 1966, dollars), Australia only achieved a truly national (standard gauge) rail network in 1995 when the Adelaide to Melbourne rail line was converted to standard gauge.[9]

The lessons of this early example of lack of coordination have apparently not yet been learned. Federation of the Colonies into the Commonwealth of Australia in 1901 provided for adequate mechanisms for the Commonwealth, States and Territories to achieve uniform and consistent laws. Unfortunately, however, that ideal has not been realised in several recent legislative initiatives which make substantial inroads into the common construction law of Australia. However, contrasting with the unhappy examples of security of payment and proportionate liability legislation, uniform Australian legislation has recently been achieved in the important area of fair trading/trade practices.

3. THE COMMON LAW OF AUSTRALIA

3.1 Australian Court System

As with other common law jurisdictions, the common law in Australia grew from its single root in England. Applicable English common law was taken at a given point in time to the Australian Colonies established by England, and incorporated by the enactment of reception statutes. The received common law was, subsequently, gradually changed by judgments in local courts and, increasingly, by local statutes.[10]

Each State and Territory has a Supreme Court, which has appellate jurisdiction to hear all matters within its jurisdiction. State Supreme Courts are also vested with Federal jurisdiction to hear actions arising under the laws of the Commonwealth of Australia.[11] Thus, a single controversy involving matters arising under

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9 http://en.wikipedia.org/wiki/Rail_gauge_in_Australia (12 January 2011).

10 See, *e.g.*, Finn, *supra* note 1, pp. 42–49.

11 See, primarily, *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).

the common law, State law and Federal law can be heard by a State Supreme Court. There is also a Federal Court which has jurisdiction to hear actions arising under Federal law. Subject to the provisions of the *Judiciary Act 1903* (Cth), the Federal Court also has delegated jurisdiction to hear matters arising under State law. The High Court of Australia is the ultimate court of appeal from both State and Territory Supreme Courts, and the Federal Court.

In principle, judgments in other common law jurisdictions (particularly England, New Zealand and Canada, but also other ex-English colonies such as the U.S.A., South Africa, and Singapore) may be consistent with the common law in Australia and relied upon by Australian judges if the factual circumstances are sufficiently similar: as Justice Paul Finn has put it, the High Court has viewed such foreign materials as being "persuasive to the extent they could persuade".[12] However, any judgment from an extraneous jurisdiction (including another State of Australia) must be carefully reviewed for any relevant differences in the applicable statutory framework or whether it has been overruled by a relevant court in the applicable jurisdiction.[13]

3.2 Possibility of Inconsistent Approaches

In simplistic terms, therefore, the judgments of an Australian State Court of Appeal constitute binding authority in respect of the common law in that State, subject to any relevant Australian High Court authority. In the absence of binding authority in one Australian State, a judgment from a superior court in another Australian State, England or another common law country may be very persuasive authority as to the applicable common law, however it is not binding. Notwithstanding apparent differences between judgments of different States, Australia (unlike the U.S.A.) has a unified common law, and the High Court of Australia is its final arbiter. That common law is, however, increasingly modified by statute law passed by the various Australian jurisdictions, which, as noted above, is frequently inconsistent.

Divergent judgments from different State Supreme Courts are not confined to issues of the common law, but extend to different constructions of the same (or substantively similar) legislation. A recent example highlights the lack of certainty arising from such inconsistent judgments.

The *International Arbitration Act 1974* (Cth) ("*IAA*") regulates international arbitration which has its "seat" in Australia.[14] In the *Eisenwerk* case,[15] a judgment of the Queensland Court of Appeal, it was held that the parties' choice of the ICC Arbitration Rules was a choice, as provided for in s. 21 of the *IAA*, "other than the UNCITRAL Model Law", and accordingly the *IAA* was held not to apply.

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12 Finn, *supra* note 1, p. 45.

13 See, *e.g.*, *Farah Constructions Pty. Ltd. v. Say-Dee Pty. Ltd.* (2007), 230 C.L.R. 89 (Aus. H.C.), at [135].

14 See, generally, Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (2011) and Luke Nottage and Richard Garnett (eds.), *International Arbitration in Australia* (2010).

15 *Australian Granites Ltd v. Eisenwerk Hansel Bayreuth Dipl-Ing Burkhardt GmbH*, [2001] 1 Qd. R. 461 (C.A.).

This decision has been the subject of considerable criticism, and the widespread view that it was wrong resulted in recent changes to the *IAA*. Two recent cases had occasion to reconsider whether the original *Eisenwerk* decision was correct or not. In *Cargill*,[16] a single judge of the NSW Supreme Court determined that the *Eisenwerk* decision was not correct, whereas the Queensland Court of Appeal, in *Wagners*,[17] declined to come to that conclusion, notwithstanding the recent amendments to the legislation.[18] It should be noted that, as a consequence, and unless determined by the High Court on an appeal from a State jurisdiction, there currently exist inconsistent constructions, binding in NSW and Queensland respectively, of a single piece of Commonwealth legislation.

4. CONSTRUCTION LAW IN AUSTRALIA

Lawrence C Mellon has recently observed that, "[i]n the United States, construction law is most accurately characterized as a morass of inconsistent legal principles, each of narrow application, varying significantly from jurisdiction to jurisdiction".[19] The same could be said of Australia. As a common law country, "construction law" consists of common law, except to the extent that the common law has been changed by statute law. Until recently there was little statute law that had an impact on construction law: the principle of freedom of contract prevailed, and tort law was almost exclusively common law.

However, times have changed, and all Australian legislatures have seen the need to modify the common law to correct various "mischiefs". Some of the legislative restrictions on common law freedom of contract are based on the recognition that parties to a contract do not necessarily have the equal bargaining power assumed by classical contractual theory.[20] This is typical in consumer contracts where an individual consumer has little opportunity to negotiate unfair or one-sided terms out of a contract.

Accordingly, there are a number of statutes in each Australian jurisdiction which may impact on freedom of contract in respect of construction contracts, or may constrain the way in which work under construction contracts may be legally carried out. The most important Australian legislation impacting on construction law comprises the following:

- the *Australian Consumer Law*;[21]

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16 *Cargill International SA v. Peabody Australia Mining Ltd.*, [2010] NSWSC 887 (N.S.W. S.C.).

17 *Wagners Nouvelle Caledonie Sarl v. Vale Inco Nouvelle Caledonie SAS*, [2010] QCA 219 (S.C).

18 See, generally, Peter Megens and Beth Cubitt, "Opting out of the Model Law" (2010) 5(4) *Construction Law International* 4.

19 "What we teach when we teach construction law" (2009) 29(3) *The Construction Lawyer* 8.

20 See, *e.g.*, Andrew Robertson, "The Limits of Voluntariness in Contract" (2005) 29 *Melbourne University Law Review* 179, at 197.

21 Comprising a schedule to the *Competition and Consumer Act 2010* (Cth), which is the harmonised re-enactment of the *Trade Practices Act 1974* (Cth) and equivalent State-based fair trading legislation. See part 5.5 below.

- security of payment legislation[22] (and, similarly, legislation providing for payment of contractor's debts[23] and for contractors' or subcontractors' liens[24]);
- proportionate liability legislation;[25]
- domestic (residential) building legislation;[26]
- statutory warranties in contracts for domestic building work;[27]
- frustrated contracts legislation;[28]
- legislation mandating licensing of builders and building professionals;[29]
- *Commercial Arbitration Acts* in each Australian State and Territory;[30]
- legislation for limitation periods for commencement of building

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22 Primarily, *Building and Construction Industry (Security of Payment) Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry Payments Act 2004* (Qld); *Building and Construction Industry Security of Payment Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Construction Contracts Act 2004* (WA)

23 *Contractor's Debts Act 1997* (NSW).

24 *Workers Liens Act 1893* (SA); *Subcontractor's Charges Act 1974* (Qld).

25 *Civil Law (Wrongs) Act 2002* (ACT) Chapter 7A; *Civil Liability Act 2002* (NSW) Part 4; *Proportionate Liability Act 2005* (NT); *Civil Liability Act 2003* (Qld) Chapter 2 Part 2; *Development Act 1993* (SA) s 72; *Civil Liability Act 2002* (Tas) Part 9A; *Wrongs Act 1958* (Vic) Part IVAA; *Civil Liability Act 2002* (WA) Part 1F; *Australian Consumer Law* Part VIA; *Corporations Act 2001* (Cth) Part 7.10 Div 2A; *Australian Securities and Investments Act 2001* (Cth) Part 2 Div 2 Subdiv GA.

26 Primarily, *Home Building Act 1989* (NSW); *Domestic Building Contracts Act 2000* (Qld); *Building Work Contractors Act 1995* (SA); *Domestic Building Contracts Act 1995* (Vic); *Home Building Contracts Act 1991* (WA).

27 See, *e.g.*, *Building Act 2004* (ACT), ss. 42 and 88; *Home Building Act 1989* (NSW), s. 18B; *Domestic Building Contracts Act 2000* (Qld) Div 2; *Building Work Contractors Act 1995* (SA), s. 32; *Housing Indemnity Act 1992* (Tas), s. 7; *Domestic Building Contracts Act 1995* (Vic), s. 8.

28 *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Frustrated Contracts Act 1959* (Vic).

29 See, *e.g.*, *Construction Occupations Licensing Act 2004* (ACT); *Building Professionals Act 2005* (NSW); *Building Act* (NT); *Queensland Building Services Authority Act 1991* (Qld); *Building Work Contractors Act 1995* (SA); *Building Act 2000* (Tas); *Building Act 1993* (Vic); *Building Services (Registration) Act 2011* (WA).

30 *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1990* (Qld).

actions;[31]

- legislation for limitation periods for commencement of actions that are not building actions;[32] and
- contributory negligence and contribution from concurrent wrongdoers.[33]

This article is confined to a brief consideration of those statutes the authors consider have the most impact on Australian construction law:

- fair trading legislation (primarily, the *Trade Practices Act*, now *Australian Consumer Law*);
- security of payment legislation; and
- proportionate liability legislation.

5. FAIR TRADING LEGISLATION

5.1 Background[34]

The *Trade Practices Act* ("*TPA*") was enacted by the Commonwealth Government in 1974 as competition and consumer legislation to prevent monopolistic practices. Its stated object is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[35] It has grown and been amended many times since it first came into operation, and has a very broad scope, including the operation of various statutory authorities responsible for promoting competition, restrictive trade practices, unconscionable conduct and "consumer protection" to name just a few topics it regulates. Although originally based on American legislation, the Australian *TPA* has no direct counterpart in the common law world in terms of the extent to which it potentially impacts upon contractual relationships.

The *TPA* has been described as "one of the most significant pieces of eco-

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31 *Building Act 2004* (ACT), s. 142; *Environmental Planning and Assessment Act 1979* (NSW), s. 109ZK; *Building Act* (NT), s. 160; *Development Act 1993* (SA), s. 73; *Building Act 2000* (Tas), s. 255; *Building Act 1993* (Vic), s. 134.

32 Primarily *Limitation Act 1969* (ACT), ss. 11 and 13; *Limitation Act 1969* (NSW), ss. 14 and 16; *Limitation Act* (NT), ss. 12 and 14; *Limitation of Actions Act 1974* (Qld), s. 10; *Limitation of Actions Act 1936* (SA), ss. 34 and 35; *Limitation Act 1974* (Tas), s. 4; *Limitation of Actions Act 1958* (Vic), s. 5; *Limitation Act 2005* (WA), ss. 12 and 13; *Australian Consumer Law*, s. 236(2).

33 Primarily, *Civil Law (Wrongs) Act 2002* (ACT), Pt. 7.3; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), Pt. 3; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), Pt. V; *Law Reform Act 1995* (Qld), Pt. 3; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s. 7; *Wrongs Act 1954* (Tas), s. 4; *Wrongs Act 1958* (Vic), Pt. V; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s. 4.

34 Sections 5.1–5.3 in this article are based on Philip Loots and Donald Charrett, *Practical Guide to Engineering and Construction Contracts* (CCH, 2009), s. 2.5.

35 *Trade Practices Act 1974* (Cth), s. 2 (now *Competition and Consumer Act 2010* (Cth), s. 2).

nomic law Australia has ever produced".[36] Further, it is said to have

> been responsible for more legal, business, administrative and political activity than even its strongest supporters or critics could have anticipated. It has set new norms of corporate behaviour in both competition and consumer protection, modifying our view of acceptable corporate behaviour and consequently improving the welfare of all Australians.[37]

The pervasive extent to which the *TPA* impacts economic activity in Australia, along with the courts' consideration of its provisions in a wide range of applications, can be gauged from the 2000-odd pages in one of the standard texts on its use, and the fact that a new edition of this work is produced every year.[38] As the Commonwealth does not have a constitutional head of power to extend the operation of the *TPA* to individuals or unincorporated organisations (unless interstate trade is involved), all States and Territories of Australia passed *Fair Trading Acts* which parallel the important "consumer protection" provisions of the *TPA*.[39]

For brevity, discussion of the *TPA* is confined to s. 52 (now s. 18 of the *Australian Consumer Law* ("*ACL*")[40]), the prohibition on misleading or deceptive conduct, and the sections which provide several of the important remedies available for its breach. This is not to suggest that s. 52 is the only provision of the *TPA* that may impact construction contracts. In particular circumstances, provisions in Part IVA (*ACL*, Pt. 2-2) on unconscionable conduct and other provisions of Part V (*ACL*, Pt. 3-1 Div. 1) on consumer protection may also be important in providing statutory constraints on conduct that is related to construction contracts.

5.2 Misleading or Deceptive Conduct

Section 52 of the *TPA* stated simply and broadly: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". In the new provision, s. 18 of the *ACL*, "corporation" has changed to "person", extending its reach to individuals and unincorporated associations (which, as noted above, previously were covered by the State-based legislation).

This is a comprehensive provision of wide impact, designed to do no less than change behaviour in the business community. The prohibition on misleading or deceptive conduct is not confined to a dispute involving a "consumer" as defined in the Act, and applies where a person (which, for these purposes, might be a sole trading subcontractor or a multinational construction company) alleges it has suffered loss through misleading or deceptive conduct. An intention to mislead or

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36 Russell V. Miller, *Miller's Annotated Trade Practices Act* (26th ed, 2005), p. viii

37 *Ibid.*

38 The latest edition is Russell V. Miller, *Miller's Australian Competition and Consumer Law Annotated* (34th ed, 2012). It is also available as an online service.

39 *Fair Trading Act (1992)* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1999* (Vic); *Fair Trading Act 1987* (WA).

40 The *Australian Consumer Law* is discussed in detail in part 5.5 below. See, generally, Miller, *supra* note 38 and www.consumerlaw.gov.au.

deceive is not necessary for a contravention of the provision, and a firm or individual that acts honestly and reasonably and takes reasonable care may nevertheless engage in misleading or deceptive conduct in breach of the Act.

The provision does not of itself create liability for misleading or deceptive conduct, but establishes a norm of conduct, breach of which has the consequences provided for in Parts VC (*ACL*, Chapter 4 — offences) and VI (*ACL*, Part 5 — enforcement and remedies) of the Act. It should be noted that, although the provision does not adopt the language of the common law, it creates a statutory cause of action which a party can sue on in addition to other causes of action such as breach of contract or negligence in tort.

"Conduct" has a broad definition, and "engaging in conduct" includes:

- doing or refusing to do any act;
- the making of, or giving effect to, a provision of a contract or arrangement;
- arriving at, or giving effect, to a provision of an understanding; and
- requiring the giving of, or the giving of, a covenant.[41]

Thus, warranties contained in contracts are "conduct" within the ambit of the *TPA/ACL*, and will breach the prohibition if they are false or misleading.[42] Further, under the above definition, silence may also be "conduct", and therefore constitute misleading or deceptive conduct, where there is a duty to reveal relevant facts,[43] or where in all the relevant circumstances, it constitutes misleading or deceptive conduct.[44]

The courts have taken a broad view as to what constitutes conduct "in trade or commerce" within the ambit of the *TPA/ACL*, for example:

- provision of professional advice by an engineer;[45]
- display of a brochure in the foyer of the company (held to constitute a representation in trade or commerce);[46]
- a representation relating to meat products, made once and in private to a meat inspector;[47] and
- statements made in video and audiotapes of lectures.[48]

Conduct will only be misleading or deceptive if it induces or is capable of inducing error.[49] Misleading or deceptive conduct does not necessarily involve

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41 *Trade Practices Act 1974* (Cth), s. 4(2)/*Australian Consumer Law*, s. 3(2).

42 *Accounting Systems 2000 (Developments) Pty. Ltd. v. CCH Australia Ltd.* (1993), 42 F.C.R 470 (Aus. F.C.).

43 *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd. (No 1)* (1988), 39 F.C.R. 546 (Aus. F.C.).

44 *Demagogue Pty. Ltd. v. Ramensky* (1992), 39 F.C.R. 31 (Aus. F.C.).

45 *Bond Corp. Pty. Ltd. v. Thiess Contractors Pty Ltd.* (1987), 14 F.C.R. 215 (Aus. F.C.).

46 *Larmer v. Power Machinery Pty. Ltd.* (1977), 29 F.L.R. 490 (Aus. F.C.).

47 *Brown v. Riverstone Meat Co. Pty. Ltd.* (1985), 60 A.L.R. 595 (Aus. F.C.).

48 *Fasold v. Roberts* (1997), 70 F.C.R. 489 (Aus. F.C.).

49 *Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd.* (1982), 149 C.L.R. 191 at 198 (Aus. H.C.).

"sharp practice"; a statement which is literally true may nevertheless be misleading or deceptive in the light of all the relevant circumstances.[50]

Decisions in case law have developed to the stage where s. 52 (now s. 18) applies across the spectrum of conduct from that directed to the public at large to private negotiations between two parties.[51] An expression of expert opinion could constitute misleading or deceptive conduct if it was not honestly held on rational grounds involving an application of relevant expertise.[52]

The strong policy underpinnings of the prohibition upon misleading and deceptive conduct mean that the parties' freedom to contract out of it, or to modify the statutory liabilities flowing from such conduct, are severely curtailed. This not only impacts the significance of behaviour prior to entering into a contract, it also limits the effect of certain types of contract clauses. For example, exemption clauses in contracts may not operate so as to negate the effects of misleading or deceptive conduct. As Sheppard J. observed:

> *the remedy conferred by s 52 of the Trade Practices Act* will not be lost whatever the parties may provide in their agreement. If a vendor of goods has engaged in misleading or deceptive conduct, the law makes that person accountable for loss and damage suffered as a result of the unlawful conduct. That conduct will usually have been committed, as in this case, prior to the signing of any contract. If, as a result of the conduct, a person is induced to enter into a contract and suffers loss, an action to recover it lies. The terms of the contract are irrelevant.[53]

The same principle may apply to a clause in a contract in which one party warrants that it has not relied on any statements by the other party to enter into the contract: such an exclusion clause cannot operate as a defence to a claim for damages if there has been misleading or deceptive conduct in contravention of the *ACL*.[54] There have been many and varied attempts to draft around the prohibition over the past 35 years. However, whether the relevant mechanism is an "entire agreement" clause, disclaimer or acknowledgement (or a combination of these), generally speaking the only effective counter to the prohibition by way of contract are those which:[55]

- form part of a factual matrix reflecting, in all the circumstances, that the relevant conduct could not in fact be characterised as misleading or de-

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50 *Hornsby Building Information Centre Pty. Ltd. v. Sydney Building Information Centre Ltd.* (1978), 140 C.L.R. 216 at 227 (Aus. H.C.).

51 Miller, *supra* note 36, p. 491.

52 *Bateman v. Slatyer* (1987), 71 A.L.R. 553 at 559 (Aus. F.C.).

53 *Clark Equipment Australia Ltd. v. Covcat Pty. Ltd.* (1987), 71 A.L.R. 367 371 (Aus. F.C.).

54 *Waltip Pty Ltd v. Capalaba Park Shopping Centre Pty. Ltd.* (1989), A.T.P.R. ¶40-975 50661 (Aus. F.C.).

55 See, generally, *e.g.*, Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (3rd ed, Thomson Reuters, 2009), pp. 526 ff.

ceptive;[56] or

- show, for the purposes of s. 82 (now *ACL*, s. 236, discussed below), that the claimant did not reasonably rely upon the conduct and therefore that the required nexus between the conduct and loss is broken.

The intrusion of the misleading or deceptive conduct provisions of the *TPA* into freedom of contract was aptly summed up by Gummow J. in respect of a contract of sale:

> it is well to bear in mind that whilst contractual rights subsisted between the parties their relationship is not governed simply by the general law as to vendor and purchaser. The legislation regulates the existence and exercise of what would otherwise be the rights at general law and, in addition, itself creates new rights and remedies.[57]

Thus, conduct in the performance of a contract which might not amount to breach of contract can nevertheless be misleading or deceptive conduct actionable under s. 52 (now *ACL*, s. 18). For example, an architect who was retained to plan a residence to a price specified by the client, and represented that the house could be built for that price in accordance with the plans he drew up, was found to have engaged in misleading or deceptive conduct.[58] In another case, an environmental consultant who prepared a contamination report was held liable to the buyer of the site for misleading or deceptive conduct when the report was found to be incorrect, notwithstanding that the buyer had no contractual relationship with the consultant and did not succeed in its claim for negligent misstatement.[59]

5.3 Actions for Damages

The primary basis for compensation for misleading or deceptive conduct is derived from s. 82 (now *ACL*, s. 236). This provides that a person who suffers loss or damage "by [under *ACL*, s. 236, "because of"] conduct of another person" that was done in contravention of s. 52 (and various other provisions) "may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention". Such an action may be commenced at any time within six years after the date on which the cause of action that relates to the conduct accrued.[60]

As s. 82 (now *ACL*, s. 236) damages are calculated on a basis set out in the Act itself and not by reference to, for example, contract or tort analogies (and, indeed, the High Court has made it clear that attempting to apply such analogies is

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56 See, *e.g.*, *Butcher v. Lachlan Elder Realty Pty. Ltd.* (2004), 218 C.L.R. 592, where a majority of the High Court regarded a disclaimer on a real estate brochure as altering the otherwise misleading effect of the brochure.

57 *Demagogue Pty. Ltd. v. Ramensky* (1992), 39 F.C.R. 31 at 37 (Aus. F.C.).

58 *Coleman v. Gordon M. Jenkins & Associates Pty. Ltd.* (1993), 9 B.C.L. 292 (Aus. F.C.).

59 *Charben Haulage Pty Ltd v. Environmental & Earth Sciences Pty. Ltd.*, [2004] FCA 403.

60 *Trade Practices Act 1974* (Cth), s. 82(2)/ *Australian Consumer Law*, s. 236(2).

likely to be unhelpful),[61] the applicable basis has been a contentious issue for judges and commentators. However, where loss has been caused by reliance upon misleading and deceptive conduct, the usual measure roughly coincides with that applicable in the torts of deceit or negligent misstatement;[62] for example, by comparing the financial position a person is in as a consequence of the misleading or deceptive conduct, with the position they would have been in had such conduct not occurred.

This is generally a different basis to damages for breach of contract, which are calculated as the amount to put a person in the position they would have been in had the contract been performed.[63] The difference between s. 82 (now s. 236) damages and damages for breach of contract is brought into sharp focus by the damages which may be available if a plaintiff has entered into a loss making contract "by" (now "because of") the misleading or deceptive conduct of the defendant. In such a situation where the plaintiff would not have entered into the contract but for the conduct in breach of the *TPA*, the misleading or deceptive conduct was the cause of the plaintiff's entire loss, and a court will award damages for the entire loss.

Since amendments made in 2004, s. 82 provided that (except in cases of deliberate or fraudulent conduct), the damages for economic loss or damage to property a claimant may recover may be reduced to the extent the court thinks just and equitable, having regard to the claimant's share in the responsibility for the loss or damage resulting from its failure to take reasonable care.

5.4 Other Remedial Orders

In addition to an order for s. 82 (now s. 236) damages, a court may make a range of other orders under s. 87 (now *ACL*, ss. 242–244), including:

- declaring the whole or part of a contract void from the beginning;
- varying contracts or arrangements;
- refusing to enforce a contract;
- directing a person who engaged in contravening conduct to refund money or return property;
- for the payment of compensation;
- to undertake repairs or supply parts;
- to provide specified services; or
- to terminate leases and mortgages or require land to be transferred.

Clearly, the range of orders available under s. 87 (now ss. 242–244) is potentially very broad, and provides for remedies in respect of a contract not available

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61 *Marks v. GIO Holdings Ltd.* (1998), 196 C.L.R. 494 at 510, McHugh, Hayne and Callinan JJ. (Aus. H.C.).

62 See, *e.g.*, *Kizbeau Pty. Ltd. v WG & B Pty. Ltd.* (1995), 184 C.L.R. 281 (Aus. H.C.).

63 That Parke B's formulation (see *Robinson v. Harman* (1848), 1 Exch. 850 at 855 (Eng. Ex. Div.)) remains the "ruling principle" for ascertaining the quantum of damages for breach of contract in Australia has recently been confirmed by the High Court: *Tabcorp Holdings Pty. Ltd. v. Bowen Investments Pty. Ltd.* (2009), 236 C.L.R. 272 at 286 (Aus. H.C.).

under the common law.

The entitlement to compensation for loss and damage under s. 87 (ss. 242–244) is somewhat different to that under s. 82 (s. 236). Relief which compensates only in part for loss or damage suffered may be awarded under s. 87, whereas s. 82 provides the right to complete recovery of loss or damage. Loss or damage "likely to be suffered" may be recovered under s. 87, but not under s. 82. Furthermore, there is no provision for damages under s. 87 to be reduced for any contributory negligence by the claimant as provided for in s. 82(1B).[64]

5.5 Australian Consumer Law

Australia's Federal, State and Territory consumer protection and fair trading laws have, over time, diverged in their form and scope. In its 2005 *Review of National Competition Policy Reforms*, the Australian Productivity Commission ("PC") identified consumer protection legislation as one of four priority areas for further reform. The PC found that

> it seemed clear that ineffective national coordination mechanisms have led to regulatory inefficiencies and inconsistencies, to the detriment of both consumers and businesses. . . . The January 2006 report of the Taskforce on Reducing Regulatory Burdens on Business reiterated this finding, based on submissions received from a wide range of stakeholders.[65]

In May 2008, the PC recommended the development and implementation of a single national consumer law after an extensive consultation process. The intergovernmental Ministerial Council on Consumer Affairs commenced work in May 2008 on a national consumer law for Australia, and agreed to its final form on 4 December 2009. As a result of this agreement, on 1 January 2011, the *Trade Practices Act 1974* (Cth) and all of the State/Territory *Fair Trading Acts* were replaced by the *Australian Consumer Law* ("*ACL*").

The implementation of the *ACL* is a good example of what can be achieved in relation to harmonizing Australian legislation across all jurisdictions in a short time frame, notwithstanding the constitutional constraints. It is a single, national law concerning consumer protection and fair trading, which applies in the same way nationally and in each State and Territory.

For the first time, consumers have the same protections and expectations about business conduct wherever they are in Australia. Similarly, businesses of all types have the same obligations and responsibilities wherever they operate in Australia.

By way of summary, as described in guidance published by the Australian Government, the *ACL*:

- replaces a wide range of existing national and State and Territory consumer laws and clarifies understanding of the law for both Australian consumers and businesses;
- is a schedule to the *Competition and Consumer Act 2010*, which is the new name of the *Trade Practices Act 1974*;

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64 *I & L Securities Pty. Ltd. v. HTW Valuers (Brisbane) Pty. Ltd.* (2002), 210 C.L.R. 109 (Aus. H.C.).

65 At p. 15.

- is applied as a law of the Commonwealth. Each State and Territory will also make the *ACL* a law of its jurisdiction so that the same provisions will apply across Australia;
- is enforced by all Australian courts and tribunals, including the courts and tribunals of the States and Territories;
- is administered by the [Australian and Competition Commission] and each State and Territory's consumer law agency.[66]

Three important points should be noted in relation to the *ACL*:

- The Productivity Commission estimated that this reform could provide benefits to the Australian community of between A$1.5 billion and A$4.5 billion a year;
- Although the *Competition and Consumer Act 2010* is a Commonwealth Act, it is given its Australia-wide operation by each State and Territory making the *ACL* a law in its own jurisdiction;
- There is a formal process for substantively amending the *ACL*, which requires the concurrence of the Australian Government and four other jurisdictions, including at least three States. The Commonwealth must advise the other jurisdictions of proposed minor or inconsequential amendments to the *ACL*, which must be put to a vote if any other jurisdiction objects.[67]

Under the Australian *Constitution*, the Commonwealth does not have constitutional power to make consumer protection laws generally, but may make laws with respect to the conduct of corporations and with respect to interstate trade. On this basis, the previous *TPA* consumer protection provisions applied to the conduct of corporations as suppliers of goods and services and to all transactions which occur across State borders. However, the States have a general power to make laws in respect of consumer protection matters, as do the Territories within the scope of the territories power in s. 122 of the Australian *Constitution*.[68] Thus, State/Territory laws were and are required to extend the ambit of consumer protection to situations outside the scope of Commonwealth law, and the *ACL*, by agreement passed in identical form in all States and Territories, will achieve consistency throughout Australia. Consistency will be maintained through an Inter Governmental Agreement which provides that, after enacting the *ACL*, all jurisdictions will repeal, amend or modify any legislation that is inconsistent with or alters the effect of the *ACL*.[69]

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66 Commonwealth of Australia, *The Australian Consumer Law: A Guide to Provisions* (2010), p. ix. It is also noted there that the provisions dovetail with those in the *Australian Securities and Investments Commission Act 2001*, so that financial products and services are treated in a consistent manner.

67 *Ibid* p. 20.

68 *Ibid* p. 17.

69 *Ibid* p. 20.

5.6 Changes Implemented in the ACL

The *ACL* is drafted in plain English, and accordingly the wording is different to the *TPA*. Existing *TPA* provisions included in the *ACL* have, in most cases, been modified and reordered to make the law clearer and also to reflect changes in drafting conventions since they were initially inserted into the *TPA*. With the exception of those areas where there have been policy changes, these drafting changes are not intended to alter the legal effect of these provisions.[70]

The provisions carried through from the *TPA* which are of primary interest to construction lawyers and their clients are to be found in Chapter 2 of the *ACL*. These include:

- the misleading and deceptive conduct prohibition discussed above (Part 2-1); and
- the various prohibitions upon unconscionable dealing in trade or commerce and in relation to certain consumer and business transactions (Part 2-2).

The *ACL* also includes new provisions that address the use of unfair contract terms in standard form consumer contracts, generally resulting in such terms being rendered void.[71] The relevant definitions are framed in terms which will be familiar to those who have had dealings with, for example, the UK *Unfair Contract Terms Act 1977*. In particular, a term is "unfair" when, essentially, it[72]

> (a) causes a significant imbalance in the parties' rights and obligations arising under the contract;
>
> (b) is not reasonably necessary to protect the legitimate interests of the supplier; and
>
> (c) causes financial or non-financial detriment to a party.

The unfair contract terms provisions commenced on 1 July 2010 at the Commonwealth level, and mirror provisions have applied in Victoria and NSW since that date.[73] They may certainly be expected to have relevance in the residential building market, however, their broader applicability in construction contracting remains to be seen and is currently a matter of some anxiety in the industry.[74] The uncertainty is generated by the definition of "consumer": whilst its effect is that, generally, transactions over A$40,000 are exempted,[75] if the relevant goods or services are "of a kind ordinarily acquired for personal, domestic or household use or consumption" then that cap does not apply.

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70 *Ibid* p. 19.

71 *Australian Consumer Law*, s. 23.

72 *Australian Consumer Law*, s. 24. Examples of such terms are provided in s. 25.

73 Commonwealth of Australia, *The Australian Consumer Law: An Introduction* (2010), p. 5.

74 See, *e.g.*, Richard Calver "The Australian Consumer Law: Impacts on the Construction Industry" *Australian Construction Law Bulletin* December 2010, 66.

75 *Competition and Consumer Act 2010* (Cth), s. 4B.

6. SECURITY OF PAYMENT

6.1 Background

The Commonwealth Government set up a Royal Commission into the building industry in Australia in 2001. Amongst the many recommendations made by the Royal Commissioner, The Hon. Terence Cole, Q.C., was the following, directed to improving cashflow in the construction industry:

> The Commonwealth enact a *Building and Construction Industry Security of Payments Act* in the form of the *Building and Construction Industry Security of Payments Bill 2003*.[76]

In spite of that recommendation for Commonwealth (uniform) legislation in respect of security of payment, each State and Territory passed its own legislation.[77]

It is apparent, from the Second Reading Speeches for each of the Acts, that the common objective of the draft of the legislation was to address the mischief of poor cash flow identified by the Royal Commission, and to facilitate the flow of cash in a swift manner down the hierarchical contractual chain on construction projects. Thus, the legislation is aimed at "improving payment outcomes for all parties operating in the building and construction industry".[78]

The first Act (NSW) included similar adjudication provisions to the *Housing Grants, Construction and Regeneration Act 1996* (UK), and formed the model upon which most other Australian jurisdictions, to varying degrees, based their legislation. Unlike the UK Act, statutory adjudication in Australia is confined to disputes over payment. However, not only are there significant differences in detail between the individual Australian Acts, there are conceptual differences between the WA and NT Acts ("west coast model") and the Acts in the other jurisdictions ("east coast model"). The west coast model is similar to the construction industry payments legislation proposed by the Cole Royal Commission *Report*,[79] and is more in harmony with the legislation passed in the UK and NZ.

6.2 Conceptual and Detailed Differences

Notwithstanding the differences in detail between jurisdictions, all the Acts comprise common constituent elements including the type of work and contracts

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76 The Hon. T.R.H. Cole, Q.C., *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations* (Canberra, 2003), p. 115. The draft Bill was set out in Appendix 1 to the Security of Payment Chapter contained in Volume 8.

77 The relevant legislation is noted *supra* note 22. The Acts commenced operation on the following dates: 26 March 2000 (NSW), 31 January 2003 (Vic), 1 October 2004 (Qld), 1 January 2005 (WA), 1 July 2005 (NT), 17 December 2009 (Tas), 1 July 2010 (ACT) and 10 December 2011 (SA).

78 R.E. Schwarten MP, in delivering the Second Reading Speech for the Queensland Bill. Similarly broad aspirations are expressed in the Second Reading Speeches for each of the other Acts.

79 The Hon. T.R.H. Cole, Q.C., *Final Report of the Royal Commission into the Building and Construction Industry*: Volume 8 (Canberra, 2003), Appendix 1.

covered, the mechanisms for enforcing regular payments and the process for undertaking and enforcing adjudication of disputes arising under the Acts. There are, however, conceptual differences between the east coast and west coast models. These have been outlined by Coggins *et al.* as follows:

> The East Coast model Acts provide a detailed statutory payments regime, overriding any inconsistent contractual provisions, which parties undertaking "construction work" or "related goods and services" may choose to engage by submitting a payment claim under the Act at regular intervals and have it responded to within a certain timeframe. Conversely, the West Coast model Acts largely preserve (rather than override) the parties' contractual interim payment regimes.
>
> The East Coast model Acts only allow for payment claims to be made up the "contractual stream" (typically by a subcontractor against its head contractor, or head contractor against its principal). Conversely, the West Coast model allows for payment claims both up and down the "contractual stream".
>
> Whilst both models allow for a statutory adjudication scheme to determine, in the interim, disputed payment claims, they differ with respect to adjudicator appointment, submissions which may be considered by an adjudicator, and the approach which an adjudicator is to adopt in order to arrive at his or her determination. In all of these respects the East Coast Acts are more restrictive, disallowing mutual agreement of an adjudicator, consideration of reasons for withholding payment which have not been duly submitted in accordance with the statutory payment scheme, and discouraging an evaluative approach to adjudicators' determinations.[80]

Whilst the different Acts within each of the models are superficially similar, there are significant differences in detail between them. In some instances, such differences may only be revealed by a word by word comparison of the different Acts. Some of the important detail differences between jurisdictions include:

- the provisions dealing with the types of arrangements to which the various Acts apply: "construction work" is not consistently defined within either the east coast or the west coast model, and the ambit of the west cost model is generally wider than the east coast model;[81]
- Victoria differs from the other "east coast" jurisdictions in relation to matters which must be excluded from a payment claim under the Act (and therefore not subject to the Act's default provisions for payment and adjudication), including variations which are not "claimable variations", latent conditions, time-related costs, changes in regulatory requirements

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80 Jeremy Coggins, Robert Fenwick Elliott and Matthew Bell, "Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia" (2010) 10(3) *Australasian Journal of Construction Economics and Building* 14, at 15 (citations omitted).

81 *Ibid* at 16–19.

and any claim for damages for breach of contract;[82] and

- the implications of the "counting of days" provisions in the Acts: in the NT, Tasmania, Victoria and WA, time continues to run for these purposes through the days between Christmas and the New Year which are not public holidays but comprise the traditional industry shutdown, whereas the ACT, NSW, Queensland and SA Acts expressly exclude this period.[83]

The significant differences between the legislation in different parts of Australia have a practical effect in the way the Acts operate, and result in considerable complexity and cost for any construction industry participants who operate in more than one jurisdiction:

> Indeed, once these disparities are appreciated, industry stakeholders — whether subcontractors challenging a payment schedule outside of their home State or general counsel of national contractors charged with drafting appropriate contractual provisions — may be forgiven for regarding the law as a multi-headed hydra rather than a guardian angel.[84]

6.3 Are the Legislative Objects being Achieved?

Another, perhaps more significant issue, is that, arguably, the east coast model is not achieving its aims of providing "a fast, cheap, non-legalistic way of resolving payment for work done or material or services supplied"[85] to improve timely cash flow in the construction industry. There are a significant number of adjudications under the Acts in NSW and Queensland: by 2008/09, the number of annual adjudication applications in each jurisdiction had reached approximately 1000, and the total value of payment claims in adjudication approximately $200 million. However, there has been, and still is, considerable litigation over the NSW Act — over 250 cases in the Supreme Court or Court of Appeal, the majority being cases where a respondent has attempted to have at least a part of an adjudicator's determination set aside. After ten years of operation of the NSW Act, there were still 21 cases in 2009 seeking to challenge the amount determined in an adjudication.[86]

Coggins *et al.* suggest that this is indicative of a failure of the east coast model to provide the appropriate level of substantive and procedural justice. By contrast with the west coast model, the east coast model is deficient in the procedures involved in submitting payment claims, the right to defend a payment claim and the procedural issues in adjudicating payment claims. Furthermore, the east coast model creates significant additional administrative and legal costs above those involved in routine contract administration because of the statutory requirements of

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82 See, *e.g.*, Matthew Bell and Donna Vella, "From motley patchwork to security blanket: The challenge of national uniformity in Australian 'security of payment' legislation" (2010) 84 *Australian Law Journal* 565, at 574.

83 Coggins *et al.*, *supra* note 80 at 16.

84 *Ibid.*

85 Victorian Building Commission introduction to the *Building and Construction Industry Security of Payment Act 2002* (Victoria), at www.buildingcommission.com.au.

86 Coggins *et al.*, *supra* note 80 at 30.

submitting and responding to a payment claim under the Act.[87]

By contrast with the considerable use of the Act in NSW and Queensland, the number of adjudications under the Victorian Act is significantly less (notwithstanding that Victoria's population and economic activity exceeds that of Queensland). Anecdotally, this appears to be a consequence of the differences in the detailed provisions between the Victorian Act and those of NSW and Queensland. In the first version of the Victorian Act, a respondent could give security for an adjudicated amount whilst challenging the adjudication in court. Whilst that restriction on cash flow was removed in the 2007 amendments, excluded amounts which cannot be included in a payment claim under the Act were introduced, resulting in legislation of considerably reduced ambit compared with NSW and Queensland.

The NSW Act has recently been further amended to simplify the procedure a subcontractor must undertake to obtain payment of an adjudicated amount.[88] These amendments take into account the intersection of the *Security of Payments Act* and another piece of State legislation, the *Contractors Debts Act 1997* (NSW), a further indication of the complexity arising from the plethora of unique legislation in every Australian jurisdiction. Moreover, and in spite of the well-documented problems that arise from the inconsistent and problematic security of payment legislation in Australia, there does not appear to be any current political will to achieve consistency between the different jurisdictions.

7. PROPORTIONATE LIABILITY

7.1 Overview

Where two or more people are liable in tort for the same damage, as a general rule of the common law they are jointly and severally liable to the plaintiff. This means that a plaintiff who obtains judgment against such joint tortfeasors can execute the judgment for the whole of the damages against any one of them ("several liability"), notwithstanding that other defendants are jointly liable for the damage suffered by the plaintiff. Statutory provisions have provided such defendants with a right of contribution against the other defendant(s), although, as discussed below, this principle has now been altered in some States in certain circumstances.

This common law principle of joint and several liability has undergone radical surgery at the hands of Australian legislators over the last 20 years as the alternative principle of *proportionate liability* has progressively been introduced. Essentially, proportionate liability means that each defendant cannot be liable to pay more than their proportionate share of the plaintiff's damages as assessed by the court. Proportionate liability was first prescribed by legislation in the early 1990s in some Australian jurisdictions to apply to defective building work.[89] This legislation applied in an action for loss or damage arising out of defective building work, where more than one party was causally responsible for loss or damage. The legis-

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87 *Ibid* pp. 23–31.

88 Details of the amendments are outlined in the Second Reading Speech of the *Building and Construction Industry Security of Payment Amendment Bill 2010* (NSW) by the Honourable Michael Veitch.

89 See *infra* note 94.

lation constrained the court in awarding damages against each party to the proportion of the total damage that the court considered to be just and equitable in relation to each party's responsibility for the loss and damage.

More recently, the proportionate liability principle has been extended to claims for economic loss or damage to property in an action for damages (contract, tort or otherwise) arising from a failure to take reasonable care, or for civil claims for damages for harm, as well as for claims for damages for misleading and deceptive conduct in contravention of the relevant *Fair Trading Act* (which legislation has now, as noted above, been subsumed within the *Australian Consumer Law*).

All States and Territories have implemented such general proportionate liability legislation.[90] The Commonwealth has also implemented similar changes that apply proportionate liability to claims for damages for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth),[91] and similar provisions appear in the *Corporations Act 2001* (Cth)[92] and the *Australian Securities and Investments Commission Act 2001* (Cth).[93] The principle of this general legislation is similar to the previous legislation applying to building actions: the court is constrained to limit the award of damages to the proportionate amount the court considers just, having regard to the extent of the defendant's responsibility.

7.2 Proportionate Liability for Building Actions

By 2004, six States and Territories had proportionate liability legislation applying to building actions.[94] The expressed rationale for this radical change to the long established common law principle of joint and several liability was the introduction of private building certifiers.[95]

Following the perceived unhappy litigation experiences of local councils who

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90 *Civil Law (Wrongs) Act 2002* (ACT), Chapter 7A (commenced 9 March 2005); *Civil Liability Act 2002* (NSW), Part 4 (commenced 1 December 2004); *Proportionate Liability Act 2005* (NT) (commenced 1 June 2005); *Civil Liability Act 2003* (Qld), Chapter 2, Part 2 (commenced 10 April 2005); *Civil Liability Act 2002* (Tas), Part 9A (commenced 1 June 2005); *Wrongs Act 1958* (Vic), Part IVAA (commenced 1 January 2004); *Civil Liability Act 2002* (WA), Part 1F (commenced 1 December 2004); *Trade Practices Act 1974* (Cth), Part VIA (commenced 26 July 2004).

91 *Trade Practices Act 1974* (Cth) (now *Competition and Consumer Act 2010* (Cth)), Part VIA.

92 Chapter 7, Division 2A, ss. 1041L–1041S.

93 Part 2, Division 2, Subdivision GA, ss. 12GP–12GW.

94 *Building Act 1993* (Vic), Part 9, Division 2 Limitation of Liability (commenced 1 July 1994); *Environmental Planning and Assessment Act 1979* (NSW), Part 4C Liability and insurance (commenced 1 July 1998); *Development Act 1993* (SA), Part 6, Division 7 Liability (commenced 15 January 1994); *Building Act 1996* (NT), Part 13 Liability (commenced 1 September 1993); *Construction Practitioners Registration Act 1998* (ACT), Part 4 Limitation of liability (commenced 15 January 1998); *Building Act 2000* (Tas), Part 14, Division 3 Liability (commenced 1 July 2004); *Building Act 2004 (ACT)*, Part 9 Liability (commenced 1 September 2004).

95 Kim Lovegrove and Lex Borthwick, "The Robak Case: Implications for Sole Defendants" (2000) 74(5) *Law Institute Journal* 72, at 72.

had previously been responsible for building certification, the professional indemnity insurance industry expressed reluctance to provide insurance cover to such professionals whose negligence might be a minor cause of loss from defective building work, but who nevertheless might be required to bear 100% of loss via the joint and several liability principle. This was a particular problem in the building industry, where every project typically involves a number of professional and trade contractors; the professionals are usually covered by insurance for their defective (negligent) work, whereas trade contractors are not, and moreover are often organisations without significant assets.[96]

Although there was a template for the proportionate liability legislation for building actions in the form of the *Model Building Act*,[97] the States and Territories that passed legislation generally implemented their own variants, and these resulted in variations in the operation of the legislation. The most significant difference is whether the court's apportionment of the total damages is confined to parties to litigation (in the case of Victoria, and arguably New South Wales and the ACT), or may include assignment of "liability" to persons found to be causally liable, even though they are not parties to the litigation (as in South Australia, the Northern Territory and Tasmania). Attribution of causal "liability" by the court to a non-party in such circumstances is of no immediate practical benefit to the plaintiff: until such a causally liable party has been found to be legally liable in further proceedings, the plaintiff does not have judgment for the total damages.

7.3 General Proportionate Liability Legislation

In early 2001, HIH, one of Australia's major insurers, was placed in liquidation. As a result, with the situation of course exacerbated by the subsequent terrorist attacks in the U.S.A. on 11 September, many types of insurance — professional indemnity insurance in particular — became harder or impossible to obtain at reasonable cost in Australia. The response of Australian governments was to introduce a range of legislative reforms, including many statutory interventions into the common law of negligence. Of particular interest to construction lawyers was the introduction of general proportionate liability legislation for claims for economic loss caused by a failure to take reasonable care, and loss by misleading or deceptive conduct.

Since passing the general proportionate liability legislation, the sections of the relevant building legislation applying proportionate liability to damages from defective building work were repealed (except in SA), and defendants no longer have to satisfy the stringent test for a "building action" to obtain the benefits of proportionate liability. However, the narrowness of the definition of "building action" in the building legislation still remains relevant to determining the applicable limitation period for court proceedings in respect of building actions in certain jurisdictions.[98]

The proportionate liability clauses in the general legislation are worded simi-

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96 Cole, *supra* note 76, vol 8, p. 237.

97 See Kim Lovegrove, *The Model Building Act for Consideration by the States and Territories: Legislative Aims and Options* (1991), p. 58.

98 See *supra* note 31 above for the relevant provisions.

larly to the previous legislation in respect of building actions. For example, the (former) *Building Act 1993* (Vic) provision stated:

> After determining an award of damages in a building action, the court must give judgment against each defendant to that action who is found to be jointly or severally liable for damages for such *proportion of the total amount of damages as the court considers to be just and equitable having regard to the extent of that defendant's responsibility for the loss or damage*[99]

and the (current) *Wrongs Act 1958* (Vic) provides as follows for any proceeding involving an "apportionable claim":

> the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage.[100]

Legislation in other jurisdictions uses similar terms for a defendant's liability for an apportionable claim, although some require apportionment where it is "just", whereas others require apportionment where it is "just and equitable". The latter phrase is the one used, for example, in the provisions of the *Wrongs Act 1958* (Vic) in respect of liability for contributory negligence,[101] and recovery of contribution.[102]

In spite of a 2003 agreement between Finance Ministers to enact uniform proportionate liability legislation, the 11 separate Acts in Australia's nine jurisdictions are all different. Some differences are only of a minor stylistic or grammatical nature, however, there are some substantive differences which make the application of proportionate liability far from uniform across Australia. As with security of payment legislation discussed above, it is necessary to compare Acts word for word to determine the differences between them. Two of the most significant differences are, however:

- Under the Victorian legislation, the court can only apportion liability between *parties* to the proceeding, whereas the other jurisdictions permit the court to consider the causal liability of non-parties, and award less than 100% of the actual damages amongst the parties to the action.
- Under the NSW, WA and Tasmanian legislation, parties to a contract can agree that proportionate liability will not apply to damages for breach. Under the other legislation, parties cannot "contract out", and proportionate liability can therefore erode the contractual allocation of risks by adversely impacting on contractual guarantees and indemnities.

7.4 Impact of Proportionate Liability Legislation

Given the substantial changes from the common law in the way in which courts must now deal with liability in multi-party property damage and economic

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99 Section 131(1) (emphasis added).

100 Section 24AI(1)(a).

101 Section 26(1)(b).

102 Section 24(2).

loss claims, the impact of proportionate liability on the practice of construction law has been profound. This impact has been exacerbated by the myriad inconsistencies between the 11 Acts.

The most obvious change is to which party takes the risk of an impecunious, insolvent or dead concurrent wrongdoer (or one who has ceased to exist). Under joint and several liability, a plaintiff has the freedom to proceed against only those assumed wrongdoers who are perceived to have a sufficiently "deep pocket" to satisfy an award of 100% of the damages, irrespective of their percentage causal liability (assuming it is greater than zero). Such a plaintiff can bypass insolvent wrongdoers (perhaps the contractor who has no assets) and proceed against an insured professional, even though such professional may only be causally liable for a very small percentage of the total loss. By contrast, under proportionate liability, the plaintiff will not recover that proportion of the total damages that was caused by an insolvent or dead party.

Another major impact has been to make litigation of building disputes much more complex, by introducing as defendants all parties who may have been causally liable for the plaintiff's loss. This has been a particularly acute issue in Victoria, because of the limitation of the legislation that damages can only be apportioned between parties to the action. Whereas the plaintiff has no interest in joining any other than the minimum number of causally-liable "deep pockets", each defendant will have an interest in spreading any liability with other concurrent wrongdoers, and will seek to join other parties under the joinder Rules of Court.

This issue has resulted in significant jurisprudence,[103] and has resulted in lengthy and complex multi-party trials in which substantial legal costs are involved. For example, in *Aquatec*,[104] a total of six additional defendants were joined to the action, in an endeavour to take advantage of proportionate liability under s. 131 of the *Building Act 1993* (Vic). In the event, none of the s. 131 claims succeeded and nor did the similar contribution claims.

In a paper aptly titled "Proportionate Liability Some Creaking in the Superstructure",[105] Justice David Byrne (who was the presiding Judge in much of the *Aquatec* proceedings) identified a number of problematic issues arising from the Victorian and Commonwealth legislation. He highlighted the following matters as requiring careful consideration in the conduct of proceedings involving proportionate liability claims:

- identification of which (if any) claims are apportionable, and which legislative regime applies;
- the appropriate directions to be made at a directions hearing, including proper pleading of the apportionment claims;

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103 See, *e.g.*, *Boral Resources Pty Ltd v. Robak Engineering & Construction Pty Ltd*; *FCH Consulting Pty. Ltd. v. Wimmera-Mallee Rural Water Authority*, [1999] 2 V.R. 507 (C.A.); *Hampton Park Central Pty. Ltd. v. Australian Safeway Stores Pty. Ltd.*, [2000] VSC 422; *Westkon Precast Concrete Pty. Ltd. v. Multiplex Constructions Pty. Ltd.*, [2000] VSC 491; *Moorabool Shire Council v. J & B Taitapanui*, [2002] VSC 418; *TNT Australia Pty. Ltd. v. CMW Design & Construction Pty. Ltd. (No 2)*, [2003] VSC 338.

104 *Aquatec-Maxcon Pty. Ltd. v. Barwon Regional Water Authority*, [2006] VSC 117.

105 A paper presented to the Judicial College of Victoria, 2006.

- applications for joinder of further parties (perhaps by defendants or non-parties), their consequences for amendment of pleadings and the requirement for proper pleading of claims between "defendants";
- the responsibility of non-party concurrent wrongdoers, and the differences in their treatment between the Victorian and Commonwealth legislation;
- the implications of contracts in precluding a party from being a concurrent wrongdoer, allocation of responsibility and post-loss contracts;
- the extraordinary difficulty if not impossibility for one of a number of concurrent wrongdoers to settle with the plaintiff, and the associated issue that the court will be unable to give judgment in default against any defendant.

Given that the introduction of proportionate liability has made such radical changes to long-established legal principles, it is not surprising that many commentaries have been written about it. For example:

- Justice Robert McDougall addressed a number of issues arising under the NSW legislation in relation to construction litigation, many similar to those identified by Justice Byrne;[106]
- Andrew Stephenson has highlighted the impact that proportionate liability has on risk allocation in contracts, and offered some suggestions for dealing with an unfavourable apportionment regime;[107] and
- Doug Jones reviewed the background to and operation of proportionate liability legislation as it existed in 2004, and aptly summed up the policy issues thus:

> Proportionate liability works best where all wrongdoers are solvent and available. This is not a reality. In an imperfect corporate world, the underlying difference between proportionate liability and joint and several liability is a philosophical approach to the allocation of damages. The question is whether it is better to allocate liability fairly, or to ensure that the victim receives the total amount of compensation to which it is entitled. The recent approach of federal, state and territory governments appears to indicate that they consider it better to allocate liability fairly among the wrongdoers.[108]

The perceived problems arising from the plethora of proportionate liability legislation resulted in the National Justice CEOs Group commissioning Tony Horan to prepare a review of national proportionate liability laws and provide recommendations on how they might become more workable, consistent and certain. There were 10 terms of reference, which elicited 28 recommendations by Horan for

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106 Justice Robert McDougall, "Proportionate Liability in Construction Litigation", Paper presented to the Building Dispute Practitioners' Society, Melbourne on 10 July 2006.

107 Andrew Stephenson, "Proportional Liability in Australia — The Death of Certainty in Risk Allocation in Contract" [2005] *International Construction Law Review* 64.

108 Doug Jones, "Proportionate Liability' (2004) 98 *Australian Construction Law Newsletter* 20.

achieving uniformity and consistency of purpose. Those recommendations were informed by a view that "Proportionate liability should only apply to those who are typically covered by professional indemnity insurance, in respect of claims against them which would usually be covered by that insurance."[109]

Thus, the recommendations included that Victoria amend its Act for consistency with other jurisdictions in respect of apportioning causal liability to non-parties, and that the right to contract out of proportionate liability be removed from NSW, WA and Tasmanian law.[110] Professor Davis then reviewed the Horan report, and put forward 12 detailed proposals to provide a basis for making recommendations to the Standing Committee of Attorneys-General ("SCAG") to achieve national uniformity of the proportionate liability legislation.[111]

At its July 2008 meeting, SCAG released the Horan and Davis reports, and "asked Officers to develop drafting instructions for model uniform proportionate liability legislation consistent with the Working Group's preliminary analysis of the recommendations made by Horan and Davis".[112] At the May 2010 SCAG meeting, Ministers agreed to instruct the Parliamentary Counsel's Committee to draft model proportionate liability provisions and that, when finalised, these will be released for public consultation.[113] Provisions were issued for comment by SCAG in September 2011.

8. CONCLUSIONS

Many aspects of construction law continue to be subject to the common law of Australia, a legal source which remains alive and well. However, where there has been legislative intervention, its impact has been profound, and perhaps greater than the legislators intended or comprehended.

It would be hard to overstate the impact of the *Trade Practices Act* (and until recently its State and Territory counterparts). The shadow of the *TPA* (now *Competition and Consumer Act 2010)* falls on every commercial transaction in Australia, and it has had a significant influence on conditioning acceptable commercial behaviour before and during the execution of construction contracts. Its effect is so pervasive that it can impact on the freedom of parties to contract, to an extent that is surprising to lawyers from other jurisdictions. Of the three types of statutory intervention considered here, it is the only one in which the various Governments of Australia have cooperated — albeit only recently — to produce uniform legislation that applies in all Australian jurisdictions.

Alas, and by contrast, the proportionate liability and security of payment legislation exhibit the worst features of parochialism in Australian politics. Despite the common mischief these pieces of remedial legislation were intended to overcome, each jurisdiction has apparently felt the need to pass legislation that is different, to

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109 Tony Horan, "Proportionate Liability: Towards National Consistency" *Report for National Justice CEOs* (2007), p. 5, available at www.scag.gov.au).

110 *Ibid* p. 10.

111 Professor J L R Davis, "Proportionate Liability: Proposals to Achieve National Uniformity" (2007), available at www.scag.gov.au.

112 Meeting outcomes at www.scag.gov.au.

113 7 May 2010 Communiqué at www.scag.gov.au.

a greater or lesser degree, to its counterparts in other States and Territories. As was described above, whilst some of the differences are minor, there are also substantive differences in principle in both proportionate liability and security of payment legislation between jurisdictions.

Uniform legislation throughout Australia requires considerable discussion and compromise between the State Attorneys-General to agree on an acceptable middle ground. There are signs of hope for consistent proportionate liability legislation, currently under discussion by SCAG. However, uniform security of payment legislation does not yet appear to be on the national radar.

In some ways, the governments of the different Australian jurisdictions have not yet matured from the mid nineteenth-century intransigent mind-set that gave Australia three different rail gauges that took a century and many hundreds of millions of dollars to rectify.

Although Australia only has 0.3% of the world's population, it has the world's seventeenth largest economy,[114] and is a member of the G20. Its successful economy is based on trade with the world, and it must continuously improve its efficiency in order to continue to compete successfully on world markets. This is recognised in principle, succinctly summed up in the following statement made in the *Final Report* of the Australia 2020 Summit convened by the (then) Prime Minister, Kevin Rudd, and held in April 2008:

> Big challenges confront the Australian economy — among them the reality of ongoing economic change and competition, the ageing of our population, climate change, and the continued projected expansion of China and India. We must be ready, and we must devise ways to grasp the opportunities presented in a way that reinforces our national values of opportunity and fairness. The answers lie in fresh ideas that can make our economy more flexible, productive and participative, allied to a macro-economic framework that can sustain strong growth without fuelling inflationary pressures.[115]

In relation to the role of federalism in improving Australia's infrastructure, the *Final Report* noted that:

> During its initial discussions the group identified a number of shortcomings with the current system, among them duplication of roles and functions between the three levels of government, lack of clarity about the respective roles of each level of government, lack of clear accountability and, as a consequence, sub-optimal delivery of government services and excessive regulation. The aspiration of the group was to provide the framework for systematically working towards a seamless national economy, with minimum inefficiencies, overlaps and bottlenecks, and clear roles, responsibilities and accountabilities between different levels of government. A true national market was the goal.[116]

Australia may be the world's seventeenth largest economy, however it is a salutary reminder of the nation's place in the world to realise that the entire eco-

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114 Output in 2005 was US$630B, as measured by gross domestic product (at purchasing power parity exchange rates): Saul Eslake, *An Introduction to the Australian Economy* (4th ed., 2007), at p. 1.

115 Commonwealth of Australia, *Australia 2020 Summit — Final Report*, at p. 37.

116 *Ibid* at p. 40.

nomic output of the eight different jurisdictions is approximately equivalent to that of the U.S. States of Illinois or Florida, one-twentieth of that of the United States as a whole, or a little over one-third of that of the United Kingdom.[117]

In the authors' view, Australia's population is too small to afford the inefficiency and increased cost resulting from having, in many cases, eight different sets of legislation applying to an industry which is one of the main drivers of the economy.[118] Ultimately, the losers from the failure of Australia's governments to agree on common legislative provisions are the citizens and business-people of Australia, who are paying more for their construction law transactions than is necessary.

117 Eslake, *supra* note 114.

118 The building and construction sector typically accounts for around 6% of GDP and around 7.5% of total employment: *ibid* at p. 16.