
ADJUDICATION IN AUSTRALIA: THE STATE OF PLAY

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AUSTRALIAN ADJUDICATION OVERVIEW

Each State or Territory in Australia has its own legislation specific to security of payment within the construction industry.

New South Wales (NSW) initially led the way with Adjudication legislation through its Building and Construction Industry Security of Payment Act 1999, and other States and Territories followed. The current Acts in place are:

- New South Wales – Building and Construction Industry Security of Payment Act 1999 (As amended by the Amendment Act 2018)
- Victoria – Building and Construction Industry Security of Payment Act 2002 (As amended by the Amendment Act 2006)
- Queensland – Building Industry Fairness (Security of Payment) Act 2017
- Western Australia – Construction Contracts Act 2004 (As amended by the Amendment Act 2016)
- Southern Australia – Building and Construction Security of Payment 2009
- Northern Territory – Security of Payment Act 2004
- Tasmania – Building and Construction Industry Security of Payment Act 2009
- ACT – Building and Construction Industry (Security of Payment) Act 2009



In 2017 the Government commissioned a national review of the various legislation across Australia, with the aim of improving consistency and the protection available to contractors and suppliers, to ensure they get paid, in a timely manner, the amounts due to them.

This review, known as the Murray Review (2017)¹, identified two distinct security of payment models referred to as the 'East Coast' and 'West Coast' models. In the East, the NSW Act provided the catalyst of adjudication we see today.

As the name would suggest, this approach is prevalent across most Eastern States such as NSW, Victoria and Queensland. The other model identified within the Murray Review is the 'West Coast Model' which is prevalent in such States as the Northern Territory and Western Australia.

Differences occur across the individual Acts; two of the key differences between the West and East Coast Models are:

- The West Coast Model only provides legal guidance where clauses in a contract fail to adequately deal with payment terms and provisions.
- The West Coast model does not endorse full payment of a claim, in the event the recipient fails to issue a payment schedule in reply to a claim.

KEY RECOMMENDATIONS FROM THE MURRAY REVIEW

Within the Murray Review (2017), Murray gave eighty-four (84) recommendations to improve the payment system within Australia and the inherent historical problem of contractors, sub-contractors and suppliers being paid late. Some of the notable recommendations include:

- National uniformity in Security of payment laws.
- Simplified Act and procedural process.
- Adjudicators should be registered and regulated.

With national contractors, sub-contractors and suppliers operating across multiple States the obvious advantage to all parties operating under one National Act would be consistency and uniformity in the process. Meanwhile, the current system allows for certain adjudication applications to be successful in one State but not in another and may not allow the process of Adjudication at all, which in turn provides uncertainty to companies contracting within the industry.

In unison with a National Act, Murray (2017, p.97) calls for the Act to be "drafted and structured as simply as possible" and to avoid tier systems as is prevalent in Queensland's two-tier system.

Murray also calls for an Adjudicator to be graded according to their ability and experience, with re-registration required every three (3) years (Murray,P.244,2017).

Many other recommendations are provided and the Murray Review (2017) should be analysed for the exhaustive list.

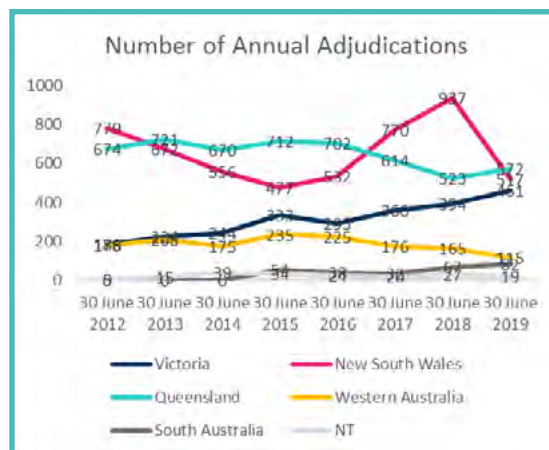
ADJUDICATION - HOW DO THE STATES COMPARE?

The number of Adjudications across Australia’s states varies greatly. In the reporting period of 2018-2019, Queensland had the highest number of adjudication applications at 572², with NSW seeing a large reduction in disputes, down from 937 the previous year to 517³. Victoria was slightly further behind at 461⁴. The annual figures by state boundaries can be observed.



The graph below shows varying trends in each State; in Victoria the number of adjudications has increased since 2012 which is in contrast to Queensland which has experienced a declining number of adjudications in the same period.

Lastly, we note statistics for South Australia are available from June 2015 only, ACT is excluded, and NCT statistics are based on a calendar year, as opposed to the June ending reporting periods.^{5,6,7,8}



The number of adjudications within each state appears to directly correlate to a state’s construction output; with NSW, Victoria and Queensland again being the top three in Australia⁹.

State	Economic Output (\$Millions)
New South Wales	147,556.24
Victoria	108,278.25
Queensland	91,338.42

Despite the hundreds of adjudications across the States respectively, some are held back by their own legislation. For example, in Victoria, the Adjudication numbers may be suppressed by the limiting nature of the Act, for example Section 10B which identifies Excluded Amounts which cannot form part of an Adjudication Application, Excluded amounts include:

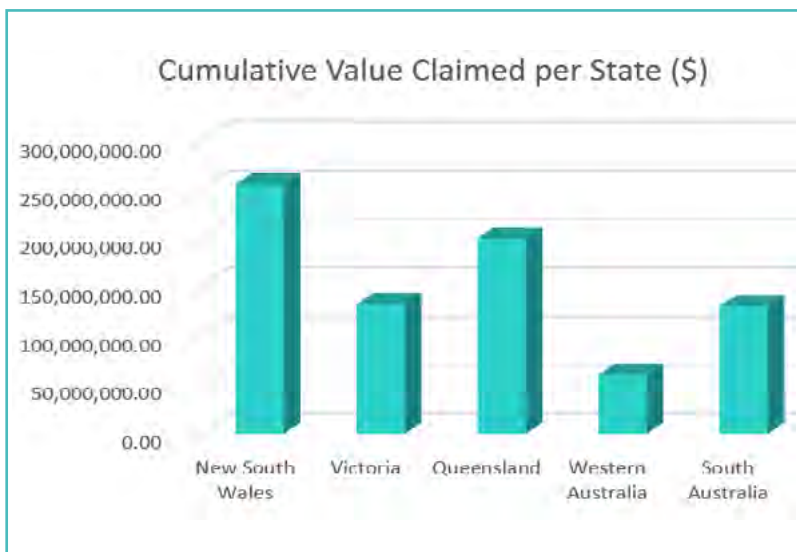
- Latent Conditions
- Time-Related Costs
- Change in regulatory requirements
- Damages for breach
- Claim arising out of law
- Any amount of a class

Section 10A of the Victorian Act also limits claims by amount and therefore any claim over this threshold amount cannot be determined through adjudication.

CLAIMS AND AWARDS - COMPARED

In addition to the numbers of adjudication varying across state boundaries, claimed and awarded amounts also differ. However, it is important to note that while the majority of States publish their annual Adjudication figures; Tasmania, ACT and Northern Territory do not.

As is clear from the state published records ending June 2019, NSW leads the way in the cumulative amount claimed in Adjudications at \$256,284,809¹⁰, with Queensland next with \$200,925,470.76¹¹ and Victoria, third with \$133,000,000.00¹².



CURRENT STATE OR TERRITORY LEGISLATION

Several States have made, or plan to make, amendments to their original Acts, using the recommendations outlined in the Murray Review (2017). However, to date there is still no National Act and so companies working nationally remain under the jurisdiction of an individual State where the works take place.

THE FORECAST

Australia's Construction Industry accounts for roughly 9% of GDP and some \$360 Billion¹³ in revenue. Like most of Australia's industries, construction is not immune to the economic turmoil caused by the recent COVID-19 Pandemic, which has seen some 7.1% of Australians out of work¹⁴. As a result of increased insolvencies and mounting pressure on jobs and cashflow, DGA expect an increase in Adjudications towards the end of 2020, by sub-contractors and suppliers seeking to recover monies relating to the economic fallout caused by COVID-19.

However, in the short term we expect Adjudications to reduce with disputes likely pushed back or delayed as a result of the Pandemic and therefore Q4 figures (June 2020) are expected to be significantly down on last year.

With annual reports due to be published for the period ending June 2020, in the next few weeks, the industry awaits a review on the true extent of the impact on Adjudications.

ENDNOTES

- 1 Murray, J. (2017) Review of Security of Payment Laws. Building Trust and Harmony.
- 2 Queensland Building and Construction Commission (2019), Annual Report 2018-2019.
- 3 New South Wales Government (2020), Adjudication Activity Statistics, Quarterly Report – No.4, 1 April 2019 to 30 June 2019.
- 4 Victoria Building Authority (2019), Annual Report 2018-19.
- 5 Annual Reports as per reference 1-3;
- 6 Government of Western Australia, Department of Mines, Industry Regulation and Safety Building and Energy (2019) Report of the Building Commissioner for the Financial Year to 30 June 2019.
- 7 Government of South Australia, Attorney General’s Department (2019), 2019-19 Annual Report.
- 8 Northern Territory Government [Online]
- 9 Economic Development Australia . (2019). Economy, Jobs and Business Insights.
- 10 New South Wales Government (2020), Adjudication Activity Statistics, Quarterly Report – No.4, 1 April 2019 to 30 June 2019.
- 11 Queensland Building and Construction Commission (2019), Annual Report 2018-2019
- 12 Victoria Building Authority (2019), Annual Report 2018-19.
- 13 Australian Industry and Skills Committee. (2020). Construction.
- 14 Australian Bureau of Statistics, (2020).

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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