

STATUTORY ADJUDICATION: A TALE OF TWO COUNTRIES

A COMPARISON BETWEEN AUSTRALIA AND THE UNITED KINGDOM

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Australia and the United Kingdom construction industries appear to have a lot in common, including common law and legislation concerning Adjudication.

Through operating in Australia and the United Kingdom, DGA Group has a unique insight into the similarities and the differences that define and distinguish adjudication within each country. In this article, I will review and analyse the fundamental components and elements of the adjudication system within each country and extract some of the key differences.

NARROWER SCOPE

Within the UK the Housing Grants Construction & Regeneration Act 1996ⁱ ("the Act") entitles a party to a construction contract, to refer any dispute to adjudicationⁱⁱ. "Any", means the dispute is not limited to the common problems of valuation and payment but also defects, delay, damages to name a few. In comparison, the types of dispute that may be resolved by an Australian state, or territories' respective Security of Payment Act are more limited.

i As amended by the Local Democracy Economic Development & Construction Act 2009

ii As defined under Section 104 of the Housing Grants, Construction and Regeneration Act 1996

In Victoriaⁱⁱⁱ for instance a party can adjudicate but only if the following criteria are met:

- The disputed amount is 'a change in the scope of work'.
- It must be a 'claimable variation'.

Furthermore, under the Victorian Security of Payment Act 2002 (as amended 2006) the following are excluded amounts, which therefore make them unclaimable under the process of adjudication:

- Latent conditions.
- Time-related costs.
- Changes in regulatory requirements.
- Damages for breach of the construction contract.

For example, any costs relating to potential entitlement to an extension of time is deemed to be an excluded amount and, therefore, resolution through adjudication is not possible.

STATES, TERRITORIES AND LEGISLATION

While some minor drafting differences exist within the English/Welsh and the Scottish Scheme for Construction Contract Regulations^{iv} the UK enjoys a fairly uniform approach to adjudication. In contrast, each of Australia's States have their own legislation governing adjudication and the procedures surrounding the form of dispute resolution. In the 2017, Murray Review^v identified two clear systems; the East Coast Model and the West Coast Model. The East Coast model was prevalent in NSW, Victoria and Queensland with the West Coast Model present in Western Australia and the Northern Territory.



Given the differing models and various legislative jurisdictions there are a variety of differences to the adjudication process within Australian States and within Murray's review^{vi}, he concluded the amount of legislation and form within which its prescribed as "unduly complex" and "confusing" (Murray,J, P17,2017).

iii Victorian Government, Building and Construction Industry Security of Payment Act 2002 (As Amended 2006).

iv Which apply if the construction contract provision for adjudication do not meet the requirements under s.108 of the Housing Grants, Construction and Regeneration Act 1996 as amended

v Murray, J. (2017) Review of Security of Payment Laws. Australian Government. Department of Jobs and Small Business. Building Trust and Harmony.

vi Murray, J. (2017) Review of Security of Payment Laws. Australian Government. Department of Jobs and Small Business. Building Trust and Harmony.

For instance, the time period within which an adjudicator application must be served, differ in the varying states. In Victoria, an application must be made within 10 business days of a Payment Schedule but within the Northern Territory, such an application can be served 90 days after the dispute arises and in Western Australia, this differs again to 28 days. Therefore, there is clearly a great care and knowledge needed in ensuring key time provisions are met within the state, within which adjudication is sought, to resolve a dispute.

Below we have outlined a summary of the Acts governing the Australian States for ease:

- [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 \(As amended by Amendment Act 2020\)](#)
- [Western Australia – Construction Contracts Act 2004 \(As amended by the Amendment Act 2016 and The Building and Construction Industry \(Security of Payment\) Bill 2020\)](#)
- [Southern Australia – Building and Construction Security of Payment 2009 \(As amended by Amendment Act 2018\)](#)
- [Northern Territory – Security of Payment Act 2004 \(As amended by Amendment Bill 2019\)](#)
- [Tasmania - Building and Construction Industry Security of Payment Act 2009](#)
- [ACT – Building and Construction Industry \(Security of Payment\) Act 2009](#)

ADJUDICATION PROCESS - TIME PERIOD

The key principle of adjudication in the UK and Australia is to provide a quick resolution to disputes. The UK stipulates that the adjudicator must make his decision within 28-days of the referral. In comparison, the Victorian Building and Construction Industry Security of Payment Act 2002 requires the adjudicator to make its adjudication (i.e. decision) within 10-business days from an adjudicator’s acceptance of the appointment. Both systems also allow an extension, which in the first instance, should be agreed by the claimant.

Below we have outlined the comparable timetables between the two countries:

United Kingdom

United Kingdom	Step/Description	DAYS																																						
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	
1	Notice of Adjudication	█																																						
2	Referral Notice							█																																
3	Adjudication Decision																																							

Australia – Victoria

Australia	Step/Description	DAYS																																					
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35			
1	Claim Issued	█																																					
2	Payment Schedule Issued		█																																				
3	Notice - Intention to Adjudicate																																						
4	Adjudication Application																																						
5	Adjudicator's Acceptance																																						
6	Respondent's Reply																																						
7	Adjudication Decision																																						

While within the UK, parties have the right to refer a dispute to adjudication at any time, in Victoria, Australia, the ability to issue an adjudication application is intrinsically linked to the issuing of a 'Payment Schedule', and thereafter a dispute occurring on the information set out within this 'Payment Schedule'. This link is shown within the above example, with the adjudication application key to starting the adjudication process within Victoria.

It should be noted that although the UK procedure durations above are slightly longer in duration than the route to a decision in Victoria, Australia, the set of circumstances can differ greatly from case to case and so the UK procedure may result in a quicker decision. However, given an extension can be requested in both jurisdictions it's likely the Australian system will yield a decision faster.

OTHER NOTABLE DIFFERENCES

In UK, parties under a construction contract can name or agree on who is to stand as an adjudicator, whereas under some Australian jurisdictions, like New South Wales' Payment Act 1999^{vii}, the dispute and application should be referred to a nominating body, who will select an adjudicator on behalf of the parties in order to resolve the dispute.

Further differences exist concerning the Adjudicator's Decision itself. In Queensland, all decisions must be made public, including the reasoning behind the decision given. Whereas in the UK a party 'may' request the Adjudicator provides reasons with his decision, and the decision is made private .

In Queensland, recent changes to their Security of Payment Act introduced a number of set financial penalties for failing to adhere to the legislation and specifically an adjudicators

vii New South Wales Government, Building and Construction Industry Security of Payment Act 199 (As Amended 2018).

decision. In contrast, the UK has no such fixed penalty exists (but instead an adjudicator's decision may be enforced in the courts and, therefore, placing a non-complying party at risk of liability to pay legal costs of the other party and court costs). Another clear difference between the UK and Australia, is that statutory adjudication has been an available method in dispute resolution longer in the UK construction industry, as such there is a greater amount of caselaw that has emanated from enforcement by the courts within the UK in comparison with Australia.

CONCLUSION

While the process of adjudication seeks to achieve the same aim of quickly resolving a dispute, the processes and procedures vary between the UK and Australia. In the UK the ability to adjudicate is wide reaching. Australia is split by the states varying legislation and is often limited and has a far narrower jurisdiction within which to operate. In the UK adjudication provides an alternative to litigation and being able to refer a dispute at any time has been greatly received, it has led a few to criticise and view the current system as 'ambush by adjudication' (Mendelle,J,p21-22,2016), which it is claimed may lead to an unfair justice being reached by the party often starting the adjudication process. While both systems are clearly not perfect, adjudication still represents a quick and cost-effective method for resolving disputes in both construction markets.

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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