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Kable and the validity of s 15 of the Building and Construction Industry Security of Payment Act 1999 (NSW) – *Jean M Hamilton-Smith*

Security of payment enactments have succeeded in achieving the legislative goal of ensuring a fast-paced mechanism for the recovery of progress payments in the construction industry. The legislation, in some States, is in equal measure effective and controversial. This article will address one aspect of that wider controversy. Section 15 of the New South Wales Act creates a cause of action in debt, where the claimant need only prove that it issued an unmet payment claim under the Act to become entitled to payment. The respondent to that cause of action is expressly not entitled to bring any cross-claim, or raise any defence in relation to matters arising under the construction contract. In this article it is argued, based upon the reasoning in *Kable*, that the warping of the judicial process, combined with the determinative nature of a s 15 judgment, is so different from the traditional judicial process as to risk offending the principle in *Kable*. 452

Monetary value: The “least worst” proxy for vulnerability in regulation of construction contracting? – *Matthew Bell and Ravindu Goonawardene*

Legislative intervention into parties’ contracting arrangements in the construction industry often has as its aim the protection of parties which are “vulnerable” in the sense that they are unable reasonably to protect their interests through negotiation of appropriate terms in the contract. However, the mechanisms by which this is done often appear somewhat arbitrary in their design and application. Therefore, this article seeks to examine whether it is possible to identify an optimal basis for such intervention. It focuses upon the current situation in Australia in respect of two key areas of construction activity where the legislature has seen fit to intervene into parties’ freedom to contract on the grounds of protection of the vulnerable: the residential building sector (protection of owners as consumers) and security of payment (protection of subcontractors and suppliers). The latter is investigated in the context of the ongoing debate over proposals towards harmonisation of the various State-based legislation in Australia and, specifically, the reforms to the New South Wales version of that legislation introduced in 2013. 465

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