

2009

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT)
BILL 2009**

EXPLANATORY STATEMENT

**Presented by
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Building and Construction Industry (Security of Payment) Bill 2009

Overview

Objectives of the Legislation

The objective of the legislation is to entitle certain persons who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply.

This will be achieved through establishing a procedure for securing progress payments to which a person becomes entitled under this Bill.

Reasons for the objectives and how they will be achieved

Security of payment has been an issue in the building and construction industry over many decades. Several taskforces and the 2003 Cole Royal Commission into the Building and Construction Industry flagged security of payment as a significant industry matter and cited strong anecdotal evidence across all jurisdictions to support the notion that security of payment problems are widespread within the industry.

The building and construction industry is particularly vulnerable to security of payment issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.

The Bill establishes a system of rapid adjudication for the interim resolution of payment on disputes involving building and construction work contracts.

Rapid adjudication will be conducted by an independent adjudicator with relevant expertise. If the decision of the adjudicator is in whole, or in part, in favour of the applicant, the respondent is required to pay a specified amount directed by the adjudicator to the applicant. Decisions by the adjudicator are enforceable as a judgement debt.

Rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal of competent jurisdiction.

The adjudication process will cover all forms of construction contracts other than contracts for the carrying out of domestic building work where an ordinary "resident owner" is a party to the contract.

Administrative arrangements

Private providers will conduct the adjudication on a user pays basis. The ACT Planning and Land Authority will act as the Minister's delegate for authorising and monitoring adjudicators and authorised nominating authorities (the organisations that appoint adjudicators).

Consultation

Extensive consultation was undertaken with industry stakeholders over an 18 month period. This included a series of meetings with relevant stakeholders and the release of a discussion paper to key employee and employer groups from the industry so that all organisations were given the opportunity to comment on the development of the legislative model.



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Detail on clauses

Part 1 Preliminary

Clause 1 – Name of Act

This is a technical clause that names the Act. The name of the Act is the *Building and Construction Industry (Security of Payment) Act 2009*.

Clause 2 - Commencement

The Act commences on 1 July 2010.

Clause 3 - Dictionary

This clause establishes that the dictionary at the end of the Building and Construction Industry (Security of Payment) Bill 2009 (the Bill) is part of the Bill.

Clause 4 - Notes

This clause establishes that notes in the Bill are explanatory and not part of the Bill.

Clause 5 - Offences against Act—application of Criminal Code etc

This clause establishes that other legislation applies in relation to offences against this Bill.

Clause 6 – Objects of Act

This sets out the object of this Bill is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person:

- (a) undertakes to carry out construction work under certain construction contracts; or
- (b) undertakes to supply related goods and services under certain construction contracts.

In particular, this Bill:

- (a) grants an entitlement to a progress payment for construction work, whether or not a construction contract provides for progress payments; and
- (b) establishes a recovery procedure for construction work progress payments.

Part 2 Important concepts

Division 2.1 Meaning of terms

Clause 7 Meaning of construction work

This clause defines the expression *construction work* for the purposes of the Bill. The definition of construction work also includes building work within the meaning of the *Building Act 2004*.

Clause 8 Meaning of related goods and services

This clause defines the expression *related goods and services* for the purposes of the Bill.

Division 2.2 Application of Act

Clause 9 Application of Act

This clause provides for the application of the Bill to all construction contracts, whether written or oral, or partly written and partly oral.

Certain classes of contract are excluded from the Bill, as are certain classes of contractual provisions.

Other classes of construction contract can be excluded from the Bill by regulations under the Bill.

Part 3 Rights to progress payments

Clause 10 Rights to progress payments

This clause provides that on and from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment.

A *reference date* is a date ascertained in accordance with the terms of the construction contract as a date for making a claim for a progress payment or as a date by reference to which the amount of a progress payment is to be calculated or, if the contract contains no such terms, the last date of the named month in which the construction work commenced, or the related goods and services were first supplied, under the contract.

Clause 11 Amount of progress payment

This clause provides for the amount of a progress payment to be ascertained in accordance with the terms of the construction contract or, if the contract contains no such terms, according to the value of construction work carried out, or related goods and services supplied, under the contract.

Clause 12 Valuation of construction work and related goods and services

This clause provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.

Clause 13 Due date for payment

This clause provides that a progress payment becomes due and payable in accordance with the terms of the construction contract or, if the contract contains no such terms, 10 business days after a progress claim is made in relation to that payment under Part 4 of the Bill.

Clause 14 Effect of pay when paid provision

This clause provides that a “pay when paid” provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A “pay when paid” provision is a provision that makes one person’s payment dependent on another person’s payment or dependent on the operation of another contract.

Part 4 Procedure for recovering progress payments

Division 4.1 Payment claims and payment schedules

Clause 15 Payment claims

This clause enables a person who is entitled to a progress payment under proposed section 10 (1) (the *claimant*) to serve a payment claim on the person who is liable to make the payment (the *respondent*). The claim will set out the amount to which the claimant claims entitlement.

Clause 16 Payment schedules

This clause enables the respondent to reply to the claim by providing a payment schedule to the claimant. The schedule will set out how much the respondent proposes to pay the claimant and when.

Clause 17 Consequences of not paying claimant-no payment schedule

This clause provides that a claimant will be able to recover the whole amount of his or her claim as a debt, and to suspend carrying out construction work, or supplying related goods and services, if the respondent fails to provide a payment schedule within the time allowed under clause 16 (4).

Clause 18 Consequences of not paying claimant in accordance with payment schedule

This clause provides that a claimant will be able to recover the amount set out in the respondent's payment schedule, and to suspend carrying out construction work, or supplying related goods and services, where the respondent provides the payment schedule within the time allowed under clause 16 but fails to pay that amount by the due date referred to in clause 13.

Division 4.2 Adjudication of disputes

Clause 19 Adjudication applications

This clause enables a claimant to apply to an authorised nominating authority for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within 5 days after the claimant receives the payment schedule, and will be able to be made to an authority authorised to nominate adjudicators for the purposes of the Bill.

Clause 20 Eligibility-adjudicators

This clause requires an adjudicator to be an individual and to have such qualifications, expertise and experience to perform adjudications and has successfully completed a relevant training course. It also prohibits a person from being an adjudicator in relation to a particular construction contract if the person is a party to the contract, or the person is employed or represents a building and construction industry organisation or in such circumstances as are prescribed by the regulations.

Clause 21 Adjudicator for application

This clause provides that the appointment of an adjudicator is effected when the adjudicator gives notice of his or her acceptance of the adjudication application to the claimant and the respondent. The adjudicator must also at the same time, with the notice of acceptance, give the respondent a copy of the adjudication application.

Clause 22 Adjudication responses

This clause enables the respondent to lodge, in writing, with an adjudicator the respondent's response to the claimant's adjudication application.

Clause 23 Adjudication procedures

This clause sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application.

Clause 24 Adjudicator's decision

This clause provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid and the rate of interest on the amount.

Clause 25 Respondent must pay adjudicated amount

This clause provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount to the claimant on or before the relevant date.

Clause 26 Failure to pay adjudicated amount

This clause provides that if a respondent fails to pay the whole or any part of an adjudicated amount, the claimant may request an adjudication certificate from the authorised nominating authority and may serve a notice on the respondent of the claimant's intention to suspend carrying out construction work or supplying related goods and services. The clause also specifies the content requirements for an adjudication certificate and matters that may be included in the certificate at the request of the claimant.

Clause 27 Filing of adjudication certificate as judgement debt

This clause enables an adjudication certificate to be filed as a judgment debt that may be enforced in any court of competent jurisdiction. If the respondent commences proceedings to have the judgment debt set aside, the respondent is not entitled to bring any counter-claim against the claimant, raise any defence or challenge the adjudicator's determination and is required to pay to the court as security the unpaid portion of the adjudicated amount.

Clause 28 Claimant may make new application in certain circumstances

This clause enables a claimant to make a new adjudication application in the event that a previous application is not accepted by an adjudicator within 4 business days after it is made or if an adjudicator fails to determine the application within the time allowed.

Division 4.3 Claimant's right to suspend construction work

Clause 29 Claimant may suspend work

This clause entitles a claimant to suspend the carrying out of construction work (or the supply of related goods and services) if at least 2 business days have passed since notice of intention to do so has been given as referred to in clause 17, 18 or 26. A claimant who suspends the carrying out of construction work (or the supply of related goods and services) under the proposed section will be immune from civil liability as during the period of suspension.

Division 4.4 Authorised nominating authorities and adjudicators

Clause 30 Maximum number of nominating authorities

This clause allows the Minister to decide the maximum number of people that may be authorised as a nominating authority.

Clause 31 Application for nominating authority

This clause enables the relevant Minister to authorise, or refuse to authorise, persons as nominating authorities (to nominate adjudicators for the purposes of the proposed Act) and to withdraw any authority so given. The Minister's decision to refuse an application is a reviewable decision.

Clause 32 Nominating authority-suitability

This clause provides the factors the relevant Minister must consider in deciding whether an applicant is a suitable nominating authority under clause 31.

Clause 33 Term of authorisation

This clause provides that an authorisation under this division is effective for 3 years starting on the day the Minister gives the authorisation and that an authorised nominating authority may apply for renewal of the authorisation.

Clause 34 Costs and expenses-authorised nominating authority

This clause provides for the costs and expenses payable to an authorised nominating authority in relation to the adjudication of an adjudication application.

Clause 35 Report-authorised nominating authority

This clause provides that an authorised nominating authority must provide a report to the relevant Minister, on request, about its activities under the Act, or costs and expenses charged by the authority for any service provided by the authority in relation to an adjudication application made to the authority.

Clause 36 Costs and expenses-adjudicator

This clause provides for the costs and expenses payable to an adjudicator in relation to his or her adjudication of an adjudication application. In particular, an adjudicator will not be entitled to be paid any fees if he or she fails to determine such an application within the time allowed under clause 21 (3).

Clause 37 Protection from liability-adjudicators and authorised nominating authorities

This clause ensures that no action will lie against an adjudicator or any other person for anything done or omitted to be done by the adjudicator honestly and without recklessness in the exercise of the adjudicator's functions under the Bill.

Division 4.5 General

Clause 38 Effect of part on civil proceedings

This clause ensures that nothing done under this part will affect any civil proceedings arising under a construction contract, except that a court will be required to make appropriate set-offs and any orders necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.

Part 5 Notification and review of decisions

Clause 39 Meaning of *reviewable decision*-pt 5

This clause provides the meaning of *reviewable decision* for the purposes of this part.

Clause 40 Reviewable decision notice

This clause requires that if a person makes a reviewable decision, the person must give a reviewable decision notice to each entity mentioned in schedule 1, column 4 in relation to the decision, and under s 67A of the *ACT Civil and Administrative Tribunal Act 2008*, the person must also take reasonable steps to give a reviewable decision notice to any other person whose interests are affected by the decision.

Clause 41 Applications for review

This clause provides that an entity mentioned in schedule 1, column 4 in relation to the reviewable decision, or any other person whose interests are affected by the decision, may apply to the ACT Civil and Administrative Tribunal for review of a reviewable decision.

Part 6 Miscellaneous

Clause 42 No contracting out

This clause avoids any provision of an agreement that purports to exclude, modify or restrict the operation of the Bill.

Clause 43 Judicial review of adjudication decision

This clause provides for appeals on questions of law by parties to an adjudication decision to the Supreme Court. The provision is modelled closely on the appeal provision under section 38, part 5 of the *Commercial Arbitration Act 1986*, save for one respect, in that the period in which an adjudicator must make a new decision has been reduced to 10 business days after the decision has been remitted. This reduction is consistent with the subject matter of the Bill.

Clause 44 Determination of question of law by Supreme Court

This clause provides that the Supreme Court has jurisdiction to determine any question of law arising in an application to the court made by any of the parties to adjudication. The provision is modelled closely on the appeal provisions under section 39, part 5 of the *Commercial Arbitration Act 1986*.

Clause 45 Review of Act

This provision requires the Minister to review the operation of the Act as soon as possible after 1 July 2015 and report on the outcome of the review to the Legislative Assembly by 1 July 2016.

Clause 46 Determination of fees

This clause provides that the Minister may, in writing, determine fees for this Bill.

Clause 47 Approved forms

This clause provides that the chief executive may, in writing, approve forms for this Act and if approved, the forms must be used.

Clause 48 Regulation-making power

This clause allows the Executive to make regulations for the purposes of this Bill.

Part 7 Repeals and consequential amendments

Clause 49 Legislation repealed

This clause repeals the *Contractors Debts Act 1897*.

Clause 50 Legislation amended-sch 2

This clause provides that this Bill amends the legislation mentioned in schedule 2.

Schedule 1 Reviewable decisions

This schedule lists the decisions and the respective provisions under the Bill that are able to be reviewed.

Schedule 2 Consequential amendments

Part 2.1 Legislation Act 2001

This part provides the amendments to other Acts as a consequence of this Bill.

Dictionary

The Dictionary defines terms used in the Bill.