

PAYMENT CHANGES FOR BUILDING CONTRACTORS

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On 9 February 2006 the Building and Construction Industry Security of Payment (Amendment) Act 2006 was read for the second time. The Bill seeks to amend the Building and Construction Industry Security of Payment Act 2002 in Victoria. One of the amendments' main aims is to improve the way the Act operates and increase consistency of the Victorian legislation, and that of New South Wales and Queensland.

The Bill will make further provision for payment for construction works, the supply of related goods and services under construction contracts. If passed it will apply to construction contracts entered into following the Bill's enactment, being no later than 30 March 2007.

The types of changes proposed by the Bill, include changes to:

- clarify the type of payments covered by the Act;
- allow claimants to apply for adjudication where no payment schedule is served in response to a payment claim;
- expedite enforcement of payment of an adjudication decision as a statutory debt through the courts; and
- define amounts that are not disputed 'variations' and exclude those amounts from the payment scheme established under the Act.

CONSEQUENCES AND IMPLICATIONS OF THE BILL

It remains to be seen what the practical impact of the amendments will be, but they do appear to carve out certain common claims, specifically disputed variations, delay costs and damages for breach of contract. The use of this legislation has been greatly limited in its application, despite

the fact that the Bill may in many cases simply mirror many of the provisions in the New South Wales legislation. The differences, rather than the similarities, are what are likely to distinguish the Victorian model in practice.

HISTORY OF THE NEW BILL

The Act came into operation on 31 January 2003 and applies to contracts entered into after that date. The Act's aim was to improve the right of builders to promptly recover progress payments and assist them in obtaining payment against defaulting parties.

A review of the Act led to the release of a detailed discussion paper by the Building Commission, to which a number of industry bodies responded. An industry working body was established to provide recommendations for amendments to the Act. Those amendments were substantially adopted in the Bill.

The proposed amended provisions were purportedly designed to mirror the amended New South Wales legislation and the similarly enacted legislation in Queensland. The reason why the greater consistency between this legislation is beneficial is that the industry will have access to the decisions made by the Courts in those other jurisdictions, to guide them in interpreting and applying the legislation in Victoria.

SUMMARY OF MAJOR CHANGES IN THE LEGISLATION

It is said that the changes to the Act are driven by a need to address uncertainty in applying the Act and to align the legislation more closely with the legislation in other jurisdictions. Some of the more notable changes are summarised below.

CLAIMS EXCLUDED

One of the Bill's most important features and certainly the amendment that will have the most interesting practical impact, is that certain claims are excluded from the Act's application (section 10B). Claims which will be excluded include claims for:

- damages for breach of contract or for damages in connection with the contract;
- time-related costs;
- latent conditions;
- amounts claimed for changes in regulatory requirements; and
- claims arising at law, other than under the construction contract (for example claims for quantum meruit).

Disputed variations are similarly excluded. However, this is only where the contract provides for a mechanism for determining whether there is an entitlement to be paid for a variation and for determining the quantum and due date for such a payment.

The New South Wales legislation does not contain similar exclusion provisions.

If the Act is amended to incorporate these exclusions, the legislation will in fact be quite dissimilar from the legislation in New South Wales and Queensland. Also in practice, the repercussions of these exclusions will be of considerable interest.

If adjudicators include any matters excluded under the Act, that part of their adjudication is void and of no effect. This is an attempt to ensure that the remaining parts of their adjudication can be saved, if they have exceeded the scope of their authority.

ENFORCEMENT

The Bill (section 19) entitles the claimant to apply for adjudication to allow unpaid portions of claimed amounts to be recovered,

when no Payment Schedule has been issued by the respondent. This amendment mirrors the process in New South Wales.

APPLICATION OF ACT EXPANDED

The Bill provides for the recovery of a wider range of progress payments. The definition of 'progress payments' has been expanded to include final payments, single or one-off payments and milestone payments. It will also allow subcontractors to use the adjudication process to access amounts clients or head contractors hold on trust for subcontractors until works are completed. This amendment mirrors the definition of progress payments in New South Wales.

REVIEW PROCEDURE

The Bill introduces a procedure for aggrieved parties to seek review of an adjudicated determination. This review process, which is made to a single adjudicator, is only available in limited circumstances. For example it is available where a payment schedule was provided by the respondent before the adjudication determination and where the adjudicated amount is more than \$100,000. The only ground for review is that the adjudicator has wrongly taken into account amounts which are excluded by the Act. A review application may also only be made after undisputed amounts have been paid by the respondent and the disputed amounts have been paid into a designated trust account. The New South Wales legislation does not contain a similar review procedure.

EXPEDITED ENFORCEMENT

The Bill also adopts the same procedure as in New South Wales for enforcement of the adjudication determination as statutory liability through the

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courts. Where a respondent fails to pay an adjudicated amount, a claimant requests a certificate from the authorised nominating authority, which is lodged in an appropriate court, as an application for judgment debt.

This process is designed to avoid the costs and time spent on court hearings. Also, it aims to prevent the respondent from delaying payment by raising defences and counterclaims. Section 28R of the Bill sets out the procedure for bringing proceedings and then provides that a person who brings proceedings to have the judgment set aside cannot challenge the adjudication determination or review the determination by the adjudicator, except on specified grounds.

TRUST MONEY/ GUARANTEES

The Act currently allows a respondent to provide trust money or a bank guarantee instead of payment on receipt of an adjudicator's determination. In the past, this has allowed respondents to avoid the principal purpose of the Act, which is to make prompt payment pending resolution of outstanding disputes. The Bill removes this concept of providing security. The concept of trust accounts has been retained so that disputed amounts must now be paid into a trust account if a respondent applies for the review of the adjudicator's determination. However the undisputed portion of the adjudication determination must be paid to the claimant. Again, this is unique to the review procedure, and is unavailable in New South Wales.

TIME LIMITS

The Bill also introduces a time limit for making a payment claim under the Act. Any payment claim must now be made within three months from the reference date for payment for each item of work

carried out or goods provided (or a longer period if the contract allows). In New South Wales, the time period for making a payment claim is 12 months.

SUSPENSION

The Bill restricts the right to suspend the works which exists under the current legislation. The claimant is now required to return to work promptly after payment is made. The Bill also provides that a claimant exercising the right to suspend, is protected from liability for losses resulting from the works being suspended. These provisions mirror the New South Wales legislation.

OTHER AMENDMENTS

Further minor amendments are made to the role, function and powers of the authorised nominating authorities and the Building Commission.

THE BILL HAS EXPANDED THE 'NO CONTRACTING OUT' PROVISION

According to section 48 of the Act, a provision in any agreement under which the application of the Act is excluded, modified or restricted, or which has the effect of doing so, is void. The 'no contracting out' provision in the Bill is broader in that it provides that the provisions of the Act apply despite any provision in the contract to the contrary. It then maintains the same prohibition as previously contained in the Act. However it adds that any provision of an agreement (whether in writing or not) that may reasonably be construed as an attempt to deter any person from taking action under the Act is void. These amendments mirror the New South Wales provisions.

INTEREST

The Bill also amends the legislation to provide for a right to claim interest from the date that payment first becomes due.

DISCRETION

The Bill permits adjudicators to exercise wider discretion in the adjudication process. That discretion includes allowing legal representation during conferences, apportioning fees between the parties and extending the time for making a determination. The interest provisions mirror the New South Wales legislation.

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