

Serial 92
Construction Contracts (Security of Payments) Legislation Amendment
Bill 2019
Ms Fyles

A Bill for an Act to amend the *Construction Contracts (Security of Payments) Act 2004*, the *Community Justice Centre Act 2005* and the *Construction Contracts (Security of Payments) Regulations 2005*

NORTHERN TERRITORY OF AUSTRALIA

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS)
LEGISLATION AMENDMENT ACT 2019

Act No. [] of 2019

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Payments) Act 2004 further amended**



NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2019

An Act to amend the *Construction Contracts (Security of Payments) Act 2004*, the *Community Justice Centre Act 2005* and the *Construction Contracts (Security of Payments) Regulations 2005*

[Assented to [] 2019]
[Introduced [] 2019]

The Legislative Assembly of the Northern Territory enacts as follows:

Part 1 Preliminary matters

1 Short title

This Act may be cited as the *Construction Contracts (Security of Payments) Legislation Amendment Act 2019*.

2 Commencement

This Act commences on the day fixed by the Administrator by *Gazette* notice.

Part 2 Amendment of Construction Contracts (Security of Payments) Act 2004

3 Act amended

This Part amends the *Construction Contracts (Security of Payments) Act 2004*.

4 Section 4 amended (Definitions)

- (1) Section 4, definitions **payment claim** and **working day**

omit

- (2) Section 4

insert

high value construction contract, see section 4A.

payment claim, see section 7A.

working day means a day other than:

- (a) a Saturday or a Sunday; or
 - (b) a public holiday; or
 - (c) a day in the period beginning on 25 December in a year and ending on 7 January in the following year.
- (3) Section 4, at the end

insert

Note for section 4

The Interpretation Act 1978 contains definitions and other provisions that may be relevant to this Act.

5 Section 4A inserted

After section 4

insert

4A Meaning of high value construction contract

A **high value construction contract** means a construction contract under which the amount payable for construction work is equal to or greater than the amount prescribed by regulation.

6 Section 5 amended (Construction contract)

After section 5(1)

insert

- (1A) A contract remains a construction contract for this Act even if the contract has expired or has been terminated.

7 Section 6 amended (Construction work)

Section 6(2)(c)

omit

8 Section 7A inserted

After section 7

insert

7A Meaning of *payment claim*

- (1) A ***payment claim*** means a claim made under a construction contract:
- (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
 - (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract; or
 - (c) for a construction contract mentioned in section 5(1A) that has been terminated – by the contractor to the principal for payment of an amount in relation to an accrued right for the contract; or
 - (d) for a construction contract mentioned in section 5(1A) that has been terminated – by the principal to the contractor for payment of an amount in relation to an accrued right for the contract.
- (2) A payment claim may include a matter:
- (a) that was included in a previous payment claim; and
 - (b) that has not been the subject of a determination under section 33(1)(b).

Examples for subsection (2)

- 1 *An amount that was included in a previous payment claim but was not dealt with at that time.*
- 2 *An amount that was included in a previous claim, but that has been subsumed into a later claim (such as a rolling claim).*
- 3 *An amount that was included in a claim that was not dealt with substantively because of procedural non-compliance.*

9 Section 10 amended (No contracting out)

Section 10(1)

omit

A

insert

Subject to section 10A, a

10 Section 10A inserted

After section 10

insert

10A High value construction contract may contract out

- (1) Despite section 10, the parties to a high value construction contract may agree to have payment disputes adjudicated other than under Part 3 if:
 - (a) the agreement is a term of the high value construction contract; and
 - (b) the contract contains a dispute resolution mechanism in accordance with the Regulations.
- (2) However, the agreement does not apply in relation to a contract entered into before the commencement unless:
 - (a) when the contract was entered into, it contained a dispute resolution mechanism that satisfies subsection (1)(b) as if the Regulations had commenced; and
 - (b) the parties expressly agree in writing after the commencement that the dispute resolution mechanism is to apply.
- (3) If a high value construction contract contains a dispute resolution mechanism mentioned in subsection (1)(b), Part 3 does not apply.
- (4) In this section:

commencement means the commencement of section 10 of the *Construction Contracts (Security of Payments) Legislation Amendment Act 2019*.

11 Section 27 amended (Who can apply for adjudication)

Section 27(a)

omit, insert

(a) the matter has already been the subject of a valid determination; or

12 Section 28 amended (Applying for adjudication)

(1) Section 28(1)

omit

90 days

insert

65 working days

(2) Section 28(3)

omit, insert

(3) The first day of the time period mentioned in subsection (1) is the day after the payment dispute arises, as set out in section 8.

13 Section 29 amended (Responding to application for adjudication)

(1) Section 29(1)

omit

10

insert

15

(2) After section 29(2)

insert

(3) However, in the response, the party responding to the application for adjudication is not required to provide information or documents that have already been provided by the applicant in the application.

14 Section 30 amended (Appointment of adjudicator in absence of agreed appointment)

(1) After section 30(1)

insert

- (1A) Within 2 working days of being served with an application for adjudication and before appointing a registered adjudicator in accordance with subsection (1)(a), the prescribed appointer may consult with the parties about the qualifications that are required for the person who will be appointed as adjudicator.

Note for subsection (1A)

The period mentioned in subsection (1) applies regardless of whether the prescribed appointer consults with the parties under this subsection.

(2) After section 30(3)

insert

- (4) If satisfied that the appointed adjudicator is unable, for any reason, to perform an adjudication, the prescribed appointer or the Registrar (whichever appointed the adjudicator) may appoint a substitute adjudicator at any time before a determination is made.

15 Section 31 amended (Disqualification of adjudicator on grounds of conflict of interest)

Section 31(8)

omit

16 Section 32 repealed (Review of disqualification decision)

Section 32

repeal

17 Section 33 amended (Adjudicator's functions)

(1) After section 33(1)(a)(ii)

insert

- (iia) the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or

- (2) After section 33(1)
insert
- (1A) Despite subsection (1)(a), the appointed adjudicator may proceed to determine an application that contains technical deficiencies if those deficiencies do not affect the merits of the application, and the Act has been substantially complied with.
- (1B) If the construction contract provides for liquidated damages, an amount determined under subsection (1)(b) to be payable may include an amount assessed as liquidated damages.
- (3) Section 33(2), after "it under"
insert
subsection (2B) or
- (4) After section 33(2)
insert
- (2A) Despite subsection (2), an application is not taken to be dismissed when the time ends if proceedings have been commenced in the Supreme Court in relation to the matter the subject of the application.
- (2B) The appointed adjudicator may, without the consent of the parties, extend the prescribed time by an additional 5 working days if the adjudicator is satisfied an extension of time is necessary to ensure procedural fairness in the making of a determination.

Note for subsection (2B)

This subsection does not affect the ability of an appointed adjudicator to extend time under section 34(3)(a).

18 Section 34 amended (Adjudication procedure)

Section 34(3)

omit, insert

- (3) An appointed adjudicator may do any of the following:
- (a) with the Registrar's consent, extend the time for making a determination under section 33(1);
- (b) if it will not adversely affect the ability of the adjudicator to adjudicate the payment disputes – adjudicate simultaneously 2 or more payment disputes between the same parties;

- (c) if it will not adversely affect the ability of the adjudicator to adjudicate the payment disputes – adjudicate the payment dispute simultaneously with another payment dispute between different parties.

19 Section 39 amended (Dismissed applications)

- (1) Section 39(2)(b)

omit

28

insert

20 working

- (2) After section 39(2)

insert

- (3) Further, if, under section 33(2), an application for an adjudication of a payment dispute is taken to be dismissed, the adjudicator must give written notice of the deemed dismissal and reasons for it to the Registrar.

Note for section 39

Section 42 of the Northern Territory Civil and Administrative Tribunal Act 2014 does not apply to a deemed dismissal under section 33(2).

20 Section 45 replaced

Section 45

repeal, insert

45 Determination may be enforced as order of court

- (1) A party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction:
- (a) a copy of the determination that the Registrar has certified to be a true copy; and
 - (b) an affidavit as to the amount not paid under the determination.
- (2) On filing a copy of the determination under subsection (1), the determination is taken to be an order of the court, and may be enforced accordingly.

- (3) This section applies regardless of whether the determination is made before or after the commencement of this subsection.

21 Section 47 amended (Effect of this Part on civil proceedings)

Section 47(3)

omit

under section 48

insert

of a decision made under section 33(1)(a)

22 Section 48 repealed (Review of adjudicator's decision to dismiss application)

Section 48

repeal

23 Section 52 amended (Registering adjudicators)

- (1) Section 52(3) and (4)

omit, insert

- (3) The Registrar may refuse to register a person as a registered adjudicator if the person is not eligible to be registered.
- (4) The Registrar may renew the registration of a person who is a registered adjudicator within the period determined by the Registrar before the registration expires:
- (a) on the application of the person; or
 - (b) on the nomination of a prescribed appointer.
- (4A) The Registrar may refuse to renew a person's registration as a registered adjudicator if the person is no longer eligible to be registered.
- (4B) A registration or renewal of a registration under this section, unless sooner cancelled, remains in force for a period of 5 years.
- (4C) The Regulations may prescribe the following:
- (a) any information to be included in an application or nomination under this section;

- (b) a fee to be paid for making an application or nomination under this section.

(2) Section 52(7)

omit

24 Section 53 repealed (Review of registration decision)

Section 53

repeal

25 Section 54 amended (Publication of adjudicators' decisions)

After section 54(2)

insert

- (3) The Registrar may provide relevant information regarding the result or a report of the decision of a registered adjudicator to a related regulatory body.

Example for subsection (3)

The following are examples of related regulatory bodies:

- (a) *the Australian Building and Construction Commissioner established under the Building and Construction Industry (Improving Productivity) Act 2016 (Cth);*
- (b) *the Director of Building Control appointed under section 7 of the Building Act 1993.*

26 Part 5 replaced

Part 5

repeal, insert

Part 5 Review by NTCAT

58 Review by NTCAT

- (1) NTCAT has jurisdiction to review a decision (a **reviewable decision**) specified in Schedule 2.
- (2) An **affected person**, for a reviewable decision, is a person specified in Schedule 2 for the decision.
- (3) An affected person for a reviewable decision may apply to NTCAT for review of the decision.

-
- (4) Subsection 5 applies if, on the review of a decision made under section 33(1)(a), the decision is set aside and referred back to the appointed adjudicator under section 50(1)(c) of the *Northern Territory Civil and Administrative Tribunal Act 2014* for reconsideration.
- (5) The adjudicator must make a determination under section 33(1)(b) within 10 working days after the date on which the decision is set aside or any extension of that time as permitted under this Act.

Note for section 58

The Northern Territory Civil and Administrative Tribunal Act 2014 sets out the procedure for applying to NTCAT for review and other relevant matters in relation to reviews.

27 Part 7, Division 1 heading inserted

Before section 66, in Part 7

insert

Division 1 Repeals

28 Part 7, Division 2 heading inserted

After section 66

insert

Division 2 Transitional matters for Justice Legislation Amendment Act 2006

29 Part 7, Division 3 inserted

After section 67

insert

Division 3 Transitional matters for Construction Contracts (Security of Payments) Legislation Amendment Act 2019

68 Existing payment claims

- (1) A payment claim that, on the commencement, had not been decided continues to be dealt with under this Act as it was in force immediately before the commencement.

- (2) In this section:

commencement means the commencement of section 8 of the *Construction Contracts (Security of Payments) Legislation Amendment Act 2019*.

69 Registration of adjudicators

- (1) A person who, immediately before the commencement, is registered as an adjudicator continues to be registered as an adjudicator for 5 years after the commencement.
- (2) Before the expiry of the period mentioned in subsection (1), the Registrar may renew the registration of a person who is a registered adjudicator in accordance with section 52(4).
- (3) In this section:

commencement means the commencement of section 23 of the *Construction Contracts (Security of Payments) Legislation Amendment Act 2019*.

30 Schedule amended (Implied provisions)

- (1) Schedule heading

omit, insert

Schedule 1 Implied provisions

- (2) Schedule, clause 5(1)(h)

omit

- (3) Schedule, clause 6(2)(a)

omit

14

insert

10 working

- (4) Schedule, clause 6(2)(b)

omit

28

insert

20 working

31 Schedule 2 inserted

After Schedule 1

insert

Schedule 2 Reviewable decisions and affected persons

section 58

Reviewable decision	Affected person
A decision of the Registrar under section 31(3) to make a declaration to disqualify an appointed adjudicator	The appointed adjudicator or a party to the payment dispute
A decision of an appointed adjudicator under section 33(1)(a) to dismiss an application	The applicant
A decision of the Registrar under section 52(3) to refuse to register a person	The applicant or the nominator
A decision of the Registrar under section 52(4A) to refuse to renew a registration	The applicant or the nominator
A decision of the Registrar under section 52(5) to cancel a person's registration	The registered adjudicator

32 Act further amended

The Schedule has effect.

Part 3 Amendment of Community Justice Centre Act 2005

33 Act amended

This Part amends the *Community Justice Centre Act 2005*.

34 Section 20 amended (When Director may act)

Section 20(2)(a)

omit

\$10 000

insert

the amount prescribed by regulation

35 Section 22 amended (Power of adjudicator)

Section 22(1)

omit

\$10 000

insert

the amount prescribed by regulation

**Part 4 Amendment of Construction Contracts
(Security of Payments) Regulations 2005**

36 Regulations amended

This Part amends the *Construction Contracts (Security of Payments) Regulations 2005*.

37 Regulations 5A and 5B inserted

After regulation 5

insert

5A High value construction contract amount

For section 4A of the Act, definition ***high value construction contract***, the amount prescribed is 500 000 000 monetary units.

5B High value construction contract dispute resolution mechanism

For section 10A(1)(b) of the Act, a dispute resolution mechanism must:

- (a) provide a process for the parties to the high value construction contract to undertake a dispute resolution; and
- (b) require that the parties undertake the dispute resolution:
 - (i) in good faith; and
 - (ii) in a timely manner; and
- (c) require that, in the event that the payment dispute is not resolved within 45 working days, payments between the parties (and to third parties) under the contract continue pending resolution of the payment dispute by a court or arbitration process; and
- (d) state that the dispute resolution mechanism continues to apply even if the contract has expired or has been terminated; and
- (e) be set out in a clear and unambiguous manner.

38 Regulation 12 amended (Information to be included in application or nomination)

- (1) Regulation 12, heading, after "**nomination**"

insert

for registration

- (2) Regulation 12(1)

omit

An

insert

For section 52(4C)(a) of the Act, an

39 Regulation 12A inserted

After section 12

insert

12A Information to be included in application or nomination for renewal of registration

- (1) For section 52(4C)(a) of the Act, an application or nomination under section 52(4) of the Act must state whether the applicant or nominee knows of any material changes to the registered adjudicator's eligibility to be registered since being registered under section 52(2) of the Act.
- (2) In addition, the application or nomination must be accompanied by an authorisation by the applicant or nominee for the Registrar to obtain a criminal history check of the applicant or nominee.

40 Regulation 13 amended (Fee for application or nomination)

Regulation 13

omit

52(3)

insert

52(4C)(b)

41 Regulation 14 amended (Information to be given by registered adjudicator)

- (1) Regulation 14(1)

omit

all words from "registered adjudicator" to "adjudicate"

insert

following information is required for each application

- (2) Regulation 14(1)(c)(ii)

omit

to the payment dispute

insert

named in the application

- (3) Regulation 14(1)(d)

omit, insert

(d) the nature of the work done or to be done to which the application for adjudication relates;

- (4) Regulation 14(1)(f)

omit

dispute

insert

claim

- (5) Regulation 14(1)(i)

omit

for the application

- (6) After regulation 14(1)(i)(i)

insert

(ia) how the amount in subparagraph (i) was calculated; and

Part 5 Repeal of Act

42 Repeal of Act

This Act is repealed on the day after it commences.

Schedule Construction Contracts (Security of Payments) Act 2004 further amended

section 32

Provision	Amendment	
	<i>omit</i>	<i>insert</i>
section 13, heading	50 days	30 working days
section 13	50 days	30 working days
	28 days	30 working days
sections 16 to 24	the Schedule	Schedule 1
section 31(6B)	14 days <i>(all references)</i>	10 working days
