



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

**Inquiry into the Construction
Contracts (Security of Payments)
Legislation Amendment Bill 2019**

August 2019

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Chair's Preface

This report details the Committee's examination of the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019.

Security of payment laws are designed to improve payment practices in the construction industry, provide protections to lower tier subcontractors and to provide rapid adjudication processes for payment disputes. Such legislation is necessary due to the power imbalances that exist within the construction industry and the vulnerabilities of subcontractors in securing payment for construction work performed.

The primary purpose of the Bill is to provide clarification on payment disputes, the adjudication process and determinations made by adjudicators. The Bill introduces new provisions that allow parties to construction contracts valued at \$505m or over to opt out of the statutory dispute resolution process, provided that certain criteria are met.

The submissions received by the Committee were largely in support of the Bill however some suggested a number of amendments. The concerns raised in the submissions are discussed within this report. The Committee has recommended that the Assembly pass the Bill and with three proposed amendments. The first amendment is to correct a drafting oversight to ensure that parties to an expired or terminated contract can make a payment claim and subsequent application for adjudication of a payment dispute.

The second and third amendments recommended by the Committee are to strengthen the provision in the Bill that will allow an adjudicator to assess and make a determination on applications that do not meet the statutory requirements of the Act. The Committee considers it is important that adjudicators are provided with guidance on how to exercise discretion when making determinations on non-compliant applications and that the reasons for doing so should be included in the adjudicator's written determination.

On behalf of the Committee, I would like to thank the organisations that made submissions to the inquiry. I also acknowledge the Attorney-General and Minister for Justice, along with the Department of the Attorney-General and Justice for their work in providing comprehensive answers to questions raised by the Committee.

I extend my thanks to the Department of the Legislative Assembly for the assistance provided to the Committee and my fellow Committee members for their support in the examination of the Bill.

A handwritten signature in black ink that reads "Tony Sievers". The signature is written in a cursive style and is underlined with a single horizontal line.

Mr Tony Sievers MLA

Chair

Committee Members

	Tony Sievers MLA Member for Brennan	
	Party:	Territory Labor
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	Standing:	House, Public Accounts
	Sessional:	Economic Policy Scrutiny
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	Kate Worden MLA Member for Sanderson	
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	Parliamentary Position	Government Whip
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	Lia Finocchiaro MLA Member for Spillett	
	Party:	Country Liberals
	Parliamentary Position:	Deputy Leader of the Opposition
	Committee Membership	
	Standing:	Privileges
	Sessional:	Economic Policy Scrutiny Social Policy Scrutiny
	Lawrence Costa MLA Member for Arafura	
	Party:	Territory Labor
	Committee Membership	
	Sessional:	Economic Policy Scrutiny
	Jeff Collins MLA Member for Fong Lim	
	Party:	Independent
	Committee Membership	
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On 15 July 2019, Member for Nhulunbuy, Mr Yingiya Mark Guyula MLA, was discharged from the Committee. On 16 July 2019, Member for Fong Lim, Mr Jeff Collins MLA, was appointed to the Committee.		

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Acknowledgments

The Committee acknowledges the organisations that made written submissions to this inquiry and the Department of the Attorney-General and Justice for appearing at the public briefing and providing an overview of the Bill.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
 - (a) The Social Policy Scrutiny Committee
 - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
 - (a) any matter within its subject area referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019 with the proposed amendments set out in Recommendations 2, 3, and 4.

Recommendation 2

The Committee recommends that proposed subsections 7A(1)(c) and (d) be amended so that the meaning of payment claim includes claims for a construction contract that has expired or been terminated for payment of an amount in relation to an accrued right for the contract.

Recommendation 3

The Committee recommends that the Assembly amend the Bill to provide for the Regulations to include guidance on the relevant factors to be considered by adjudicators when exercising the discretionary power provided for in proposed section 33(1A).

Recommendation 4

The Committee recommends that section 38 of the *Construction Contracts (Security of Payments) Act 2004* be amended to require that the content of a determination made under section 33(1)(b) state the reasons that an adjudicator has relied upon when proceeding with an application that contained technical deficiencies.

1 Introduction

Introduction of the Bill

1.1 The Construction Contracts (Security of Payments) Legislation Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 15 May 2019. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 6 August 2019.¹

Conduct of the Inquiry

1.2 On 16 May 2019, the Committee called for submissions by 14 June 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 As noted in Appendix A, the Committee received three submissions to the inquiry and held a public briefing with the Department of the Attorney-General and Justice on 20 May 2019. The Committee wrote to the Attorney-General seeking clarification of issues raised in the submissions.

Outcome of Committee's Consideration

1.4 Sessional Order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments set out in Recommendations 2, 3 and 4.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019 with the proposed amendments set out in Recommendations 2, 3, and 4.

¹ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Explanatory Speech*, Draft Daily Hansard, 15 May 2019, <http://www.territorystories.nt.gov.au/jspui/handle/10070/307367>.

Report Structure

- 1.6 Chapter 2 provides the background to the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 The term ‘security of payment’ refers to ‘the entitlement of contractors, subcontractors, consultants or suppliers in the contractual chain to receive progress payments due to them for construction work undertaken under a construction contract.’² Each jurisdiction in Australia has different security of payment legislation and the jurisdictions can be grouped into the West Coast Model (WA and NT) and the East Coast Model (all other jurisdictions).

2.2 Security of payment legislation has been enacted largely due to the structure and operation of the construction industry, as outlined in the *Review of Security of Payment Laws: Building Trust and Harmony* (the Murray Review):

Because of the pyramidal structure of the construction industry, whatever contractual terms the head contractor has agreed with the client, the contracts that the head contractor will enter into with subcontractors will be on a back-to-back basis. Thus, if the head contractor agreed to onerous provisions in the contract with the client (such as unfavourable payment terms or tight timeframes in respect to giving notices etc.), the head contractor will seek to pass on the associated risks to its subcontractors.

Importantly, the subcontractors at the base of the pyramid lack the bargaining power to negotiate more favourable provisions, such as better payment terms or interest for late payment. This hierarchical contractual chain leaves subcontractors not only vulnerable to the consequences of late payment (and therefore having to draw on their own sources of finance, such as overdraft facilities, to meet payment obligations to suppliers and their employees), but also to the risk of insolvency of parties higher up the pyramid.³

2.3 The purpose of legislative intervention is to improve payment practices in the industry, provide protections for subcontractors and to provide rapid adjudication processes for payment disputes. Security of payment legislation contains provisions to prohibit or invalidate unfair payment terms and to create implied clauses within construction contracts.

2.4 In the Northern Territory, a party to a construction contract may make a payment claim for performance or non-performance of obligations under the contract. If the amount claimed is not paid by the due date, or the payment claim is rejected or disputed (either in part or full), this gives rise to a payment dispute. When a payment dispute occurs, any party to the contract may apply for a payment dispute adjudication. The adjudicator will consider the information provided by the applicant and respondent and make a determination. If a party does not comply with the adjudicator’s decision, enforcement of the determination can be sought through the courts. If one of the parties to an adjudicator’s determination is dissatisfied with the determination, they can commence legal proceedings through the courts.

² J Murray, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Australian Government, December 2017, p. 7.

³ J Murray, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Australian Government, December 2017, p. 12.

Purpose of the Bill

2.5 The purpose of the Bill, as stated in the Explanatory Statement, is to:

- (a) clarify when a payment dispute arises, when adjudication may occur, and how determinations may be enforced;
- (b) standardise the timeframes in which something must be done under the *Construction Contracts (Security and Payments) Act* to that of business days and define the meaning of that term;
- (c) modify adjudication timeframes and revise the processes for appointing adjudicators;
- (d) provide for 'opting out' of adjudication under the *Construction Contracts (Security and Payments) Act 2005* for high value construction contracts;
- (e) provide a mechanism that will allow the monetary limit for adjudications that may be undertaken by the Director of the Community Justice Centre to be determined in regulations; and
- (f) transfer review jurisdiction under Part 5 of the *Construction Contracts (Security of Payments) Act 2004* from the Local Court to the Northern Territory Civil and Administrative Tribunal (NTCAT).⁴

⁴ Explanatory Statement, Construction Contracts (Security of Payments) Legislation Amendment Bill 2019, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 1.

3 Examination of the Bill

Introduction

- 3.1 The three organisations that made submissions to the inquiry expressed support for the Bill, however were critical of a number of the proposed amendments as outlined in this chapter. Master Electricians Australian (MEA) stated that it:

largely supports the changes being suggested in the Bill however we would highlight a number of issues that we believe are contrary to the Murray report or those views held in the Building Ministers Forum Meeting from early 2019 whereby all Ministers agreed that draft legislation be constructed based on the Murray review for consideration for future changes to relevant Security of Payment Acts.⁵

- 3.2 The Committee sought advice from the Department of the Attorney-General and Justice (the Department) on whether the proposed amendments in the Bill are consistent with recommendations from the Murray Review and was advised:

The recommendations in the Murray Review were predicated on the adoption of the New South Wales version of the East Coast model. No jurisdiction has agreed to take up the Murray Review's recommendations, and some jurisdictions with East Coast model schemes have made amendments to their respective laws that shift away from the Murray Review recommendations, including New South Wales.

Local stakeholders (such as the Construction Industry Association) continue to support retention of the West Coast model, and the West Coast model already provides for areas that the Murray Review recommends should be adopted; for example, the Act currently covers residential building construction, while the East Coast model excludes those contracts (recommendation 12 of the Murray Review).

The Building Ministers Forum (BMF) communique of 10 August 2018 noted that jurisdictions would 'agree to work collaboratively to consider ways to improve consistency between security of payment regimes across jurisdictions', however consensus has not been reached on how that will be achieved. The BMF communique of 8 February 2019 noted that there was agreement to 'develop model legislation for deemed statutory trusts, for jurisdictions to draw upon'.⁶

- 3.3 The Committee also sought advice on whether further amendments are anticipated to implement recommendations from the Murray Review and was informed by the Department:

The overall objectives of the Murray Review recommendations is to provide a scheme that offers a fair, fast and inexpensive dispute resolution scheme. The Territory's Act achieves that intent and, in places, extends beyond the Murray Review's recommendations ... There is currently no intention to amend the Act to adopt recommendations contained in the Murray Review that introduce complex and rigid processes.⁷

⁵ Master Electricians Australia (MEA), Submission No. 3, 2019, p. 4.

⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 1.

⁷ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 2.

Definition of construction contract – section 5 amendment

3.4 Clause 6 inserts section 5(1A) to amend the definition of ‘construction contract’ to state that a ‘contract remains a construction contract for the purposes of this Act even if the contract has expired or has been terminated.’ During the public briefing, the Committee was advised by the Department that the amendment is:

to clarify that it relates to the rights that have accrued under the contract so that if a contract is terminated, a contractor can still claim for payments that they would have been due after having performed the work before that contract was terminated.⁸

3.5 Housing Industry Australia (HIA) does not support the inclusion of this section, stating in their submission:

Unless the contract provides otherwise, generally there are only two types of accrued rights that survive termination:

- the right to damages for breach of contract; and
- the right to receive performance of a contractual obligation. This might include the right to payment of an amount fixed by the contract which has ‘unconditionally accrued’ prior to termination.

If the right to issue a progress payment has accrued at the time of termination, then the security of payment laws should apply.

However, it would appear to add further complexity to an already complex process, if the application of security of payment laws were to now apply where there is no contractual entitlement to payment. What has been proposed is overly broad.⁹

3.6 MEA expressed support for recommendation 17 of the Murray Review which states ‘the legislation should enable a claimant, where a construction contract has been terminated, to make a payment claim for construction work carried out (or related goods and services supplied) up to the date of termination.’¹⁰

3.7 In response to written questions from the Committee, the Department confirmed that under the current Act, parties are able to make payment claims for work performed prior to the expiry or termination of a construction contract. The Department stated:

There is the risk at the moment that payment claims made after the contract has ended for work done during the contract may be rejected on the grounds that there is no longer a contract that can have a payment claim made against it as it has ended.

The amendment to the definition of construction contract is to make it clear that the Act may be used to resolve disputes over payments arising from performance (or non-performance) of obligations under the contract even though the contract is no longer in operation.¹¹

⁸ Public Briefing, Committee Transcript, 20 May 2019, p. 1.

⁹ Housing Industry Australia (HIA), Submission No. 2, 2019, pp. 4-5.

¹⁰ MEA, Submission No. 3, 2019, p. 2; J Murray, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Australian Government, December 2017, p. 132.

¹¹ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, pp. 2-3.

Committee's Comments

3.8 The Committee is satisfied with the Department's explanation.

Meaning of payment claim – section 7A inserted

Expired and terminated contracts

- 3.9 Clause 8 inserts proposed section 7A which provides a new definition of 'payment claim' which includes at (c) and (d) claims under a construction contract that has been terminated for payment of an amount in relation to an accrued right for the contract.
- 3.10 While the proposed definition of construction contract includes both expired and terminated contracts, the definition of payment claim under subsections 7A(1)(c) and (d) only references terminated contracts.
- 3.11 The Committee sought advice from the Department on why there is a distinction between the two amended definitions and whether the current drafting of subsections 7A(1)(c) and (d) would prevent a party to an expired contract from lodging a payment claim and subsequent application for adjudication of a payment dispute.
- 3.12 The Department advised that, as currently drafted, there is a possibility that a party to an expired contract could be prevented from lodging a payment claim, and further stated that subsections 7A(1)(c) and (d) should also apply to expired contracts and that this could be address through a consideration in detail stage amendment.¹²

Committee's Comments

3.13 The Committee considers that proposed subsections 7A(1)(c) and (d) should be amended to explicitly include expired contracts.

Recommendation 2

The Committee recommends that proposed subsections 7A(1)(c) and (d) be amended so that the meaning of payment claim includes claims for a construction contract that has expired or been terminated for payment of an amount in relation to an accrued right for the contract.

Amounts included in a previous payment claim

3.14 Proposed subsection 7A(2) further expands the definition of payment claim to allow a claim to include an amount that was included in a previous payment claim that has not been the subject of an adjudicator's determination made under section 33(1)(b). Clause 8 provides three examples 'to provide further guidance on what constitutes a payment claim.'¹³

¹² Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 3.

¹³ Explanatory Statement, Construction Contracts (Security of Payments) Legislation Amendment Bill 2019, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 3.

- 3.15 Example two in the Bill states that a payment claim may include ‘an amount that was included in a previous claim, but that has been subsumed into a later claim (such as a rolling claim).’ The Civil Contractors Federation NT (CCFNT) consider that the amendment makes the timing of when a payment dispute arises unclear and subsequently creates uncertainty about the timeframe for a party to lodge an application for adjudication of a payment dispute. The CCFNT stated:

an amendment is necessary either to s. 7A of the Bill or to s. 8 of the Act to clarify an uncertainty which the proposed s. 7A engenders... This leaves it uncertain as to whether s. 7A(2) is intended to allow a contractor to bring an adjudication application for a rolled-up amount included in a later payment claim, even though part of that amount was included in an earlier payment claim, and that part would otherwise be out of time.

For example, is s. 7A(2) intended to allow a contractor to bring a valid adjudication application for \$100,000 on 2 July, in circumstances where:

- a. The contractor's progress claim 1 for \$40,000 and was due for payment on 28 February, but remains unpaid, and
- b. On 1 May the contractor rendered progress claim number 2, which was due for payment on 1 June, and which was for \$100,000 made up of \$60,000 for works performed since progress claim 1, and the unpaid amount of progress claim one itself?

The answer is not clear. The Federation submits that this uncertainty is undesirable and needs to be clarified by further appropriate amendment, one way or the other.¹⁴

- 3.16 The Committee referred the example included in the CCFNT submission to the Department to clarify whether the applicant would be able to include amounts lodged in the first payment claim in a subsequent payment claim. The Department advised the Committee that the amount could be included in a subsequent claim:

provided that the amount in the first payment claim has not been paid in full, or a determination has not been made on that first amount.

Using the Civil Contractors Federation NT's example, if \$20 000 of the \$40 000 initial claim had been paid and \$20 000 was still outstanding, the contractor could only include the outstanding \$20 000 in the second invoice.

Continuing with that example, if the initial \$40 000 claim had been to adjudication and the contractor awarded only \$20 000, the other \$20 000 could not be included in the new claim because the first claim has already been determined.¹⁵

- 3.17 In respect to the timeframe for applying for an adjudication where a contract allows for rolling invoices and a previous payment claim has been made which has not been subject to an adjudication determination, the Department informed the Committee that the new invoice will set the timeframe for subsequent payment claims and an application for adjudication.¹⁶

- 3.18 The Committee notes that the issue of rolling invoices is also discussed in the *Review of the Construction Contracts (Security of Payments) Act (NT): Issues Paper* released in 2017 by the Department of the Attorney-General and Justice which states:

¹⁴ Civil Contractors Federation NT (CCFNT), Submission No. 1, pp. 1-2.

¹⁵ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 4.

¹⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 3.

The NT Act seeks to ensure that proceedings under it commence within a specified time of when a payment is due. Often a construction contract will include terms where consolidated invoices or payment claims can be issued. Such terms allow rolling invoices that pick up outstanding amounts under previous payment claims.

The latest payment claim in a series of rolling payment claims supersedes all past claims, resulting in previous outstanding amounts forming part of the latest claim. This has an impact on assessing when the applicable time period is for the lodging of a payment dispute application.

The ability to reissue a payment claim on a rolling basis extends the time to make an application to the payment dispute arising from the latest rolling claim, rather than an earlier one. The matter of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 suggests that where a contract provides for rolling invoices, the result may be that the contract permits the same unpaid moneys to be the subject of more than one payment dispute.¹⁷

- 3.19 Clause 11 (section 27 amended – who can apply for adjudication) in the Explanatory Statement provides further detail on amounts that have been included in a previous payment claim that have not been the subject of an adjudicator’s determination:

This clause amends the restrictions on when a party may apply for adjudication of a payment dispute by replacing the current subsection (a) exclusion where an application has already been made regardless of whether a determination was made in relation to it or not, with a new subsection (a) that limits the restriction to whether the matter relating to the dispute has been the subject of a previous valid determination.

This amendment seeks to clarify that unless the matter has already been dealt with through an adjudicator determining the dispute, a party should be able to make an application for adjudication, including (but not limited to):

- (a) where a further payment dispute has arisen before the current application has been determined (enabling the party to include both matters in the one application, such as, for example, where the contract permits rolling invoicing);
- (b) where a previous application was dismissed without determination; and
- (c) where the party has withdrawn the application before it was determined (such as where the party has identified a defect in the application and wishes to submit a compliant application).¹⁸

Committee’s Comments

- 3.20 The Committee considers that the drafting of the amendments and advice provided by the Department are sufficiently clear in relation to the inclusion of amounts from a previous payment claim where a contract permits rolling invoices and the amounts have not been paid or subject to an adjudicator’s determination.

Assessing non-compliant applications

- 3.21 HIA does not support the inclusion of subsection 7A(2) and the examples, in particular example three which states a payment claim may include ‘an amount that

¹⁷ Department of the Attorney-General and Justice, *Review of the Construction Contracts (Security of Payments) Act (NT): Issues Paper*, October 2017, pp. 20-21.

¹⁸ Explanatory Statement, Construction Contracts (Security of Payments) Legislation Amendment Bill 2019, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 3.

was included in a claim that was not dealt with substantively because of procedural non-compliance'. HIA stated:

Whilst technical requirements should not invalidate applications unnecessarily, HIA does not consider it appropriate that adjudicators be empowered to effectively exercise a judicial discretion in permitting applications that fail to comply with the statutory criteria.¹⁹

- 3.22 Proposed section 33(1A) provides an adjudicator with the discretion to continue to assess a non-compliant application for adjudication:

Despite subsection (1)(a), the appointed adjudicator may proceed to determine an application that contains technical deficiencies if these deficiencies do not affect the merits of the application, and the Act has been substantially complied with.²⁰

- 3.23 The Explanatory Statement notes that the functions of an adjudicator will be amended by:

inserting a new section 33(1A) that permits an adjudicator proceeding with an application where that application does not fully comply with the Act, however there has been substantial compliance and any non-compliance does not affect the merits of the application.²¹

- 3.24 The Committee questioned the Department on the appropriateness of adjudicators being empowered to exercise discretion by allowing non-compliant applications to be assessed and a determination made, as opposed to advising an applicant to withdraw the application and resubmit a compliant application. The Department advised:

Currently under section 33(1)(a)(ii), an adjudicator must dismiss an application if it has not been prepared and served in accordance with section 28, even if it has a minor defect such as listing the respondent's trading name rather than its legal name, or has been served via e-mail rather than in person or by post. Where this happens, the applicant may be prevented from making another application with the correct information, and may either have to go to court to have the issue resolved, or forgo the payment.

Preventing an applicant from having a dispute determined due to minor technical issues is at odds with a scheme to provide speedy resolution of those disputes.²²

- 3.25 When asked what guidance would be provided to adjudicators to decide whether a non-compliant application should be assessed and a determination made, the Department informed the Committee:

The circumstances surrounding non-compliance will vary from application to application, and will be subject to the nature of the defect and the merits of the individual application. As the ability to accept a non-compliant application will be discretionary, it is neither appropriate nor possible to provide guidelines on how to exercise that discretion. It will necessarily come down to an adjudicator's assessment of the level of compliance with the Act, and the merits for and against proceeding with the application.²³

¹⁹ HIA, Submission No. 2, 2019, p. 5.

²⁰ Proposed section 33(1A).

²¹ Explanatory Statement, Construction Contracts (Security of Payments) Legislation Amendment Bill 2019, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 4.

²² Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 4.

²³ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 4.

Committee's Comments

- 3.26 The Committee considers that the drafting of proposed section 33(1A) provides adjudicators with very broad discretionary powers in deciding whether to assess and make a determination on a non-compliant application. While the Committee acknowledges that the intent of payment dispute adjudications is to provide a rapid dispute resolution process and automatically dismissing non-compliant applications is contrary to this intent, it is unclear how the adjudicator exercises this discretion.
- 3.27 Given that adjudicator's determinations are binding and a party that is dissatisfied with a determination must commence legal proceedings through the courts, the Committee is of the view that exercising discretionary powers to assess non-compliant applications must be undertaken with caution and the use of such powers should be justified.
- 3.28 The very nature of discretionary decision making is that it requires an element of judgement about the decision by the decision maker. To ensure that discretion is exercised appropriately, it is essential that there are criteria to be assessed against so the decision maker understands the relevant considerations in making their assessment.
- 3.29 The principles of good administrative decision making require guidance to be provided to decision makers exercising discretionary powers. The Commonwealth Ombudsman, Ombudsman Western Australia and the former Administrative Review Council have all published documents on best practice for administrative decision making that discuss options for providing guidance through legislation, regulations and agency policies.
- 3.30 The Committee considers that, given the breadth of the discretionary powers in proposed section 33(1A), guidance should be provided in the regulations to assist adjudicators in determining if the 'technical deficiencies' of an application affect the merits of the application and whether 'the Act has been substantially complied with'.

Recommendation 3

The Committee recommends that the Assembly amend the Bill to provide for the Regulations to include guidance on the relevant factors to be considered by adjudicators when exercising the discretionary power provided for in proposed section 33(1A).

- 3.31 The Committee is also of the view that if an adjudicator exercises this discretionary power to assess a non-compliant application and makes an adjudication determination, the written determination needs to include a statement of reasons as to why the adjudicator considered that it was appropriate to proceed with making a determination on an application that did not meet the statutory requirements.

Recommendation 4

The Committee recommends that section 38 of the *Construction Contracts (Security of Payments) Act 2004* be amended to require that the content of a determination made under section 33(1)(b) state the reasons that an adjudicator

has relied upon when proceeding with an application that contained technical deficiencies.

High value construction contract may contract out – section 10A inserted

- 3.32 Clause 10 inserts new provisions that enable the parties to a ‘high value construction contract’ to opt out of the statutory dispute resolution mechanisms contained within the Act under certain circumstances. Proposed regulation 5A prescribes that a high value construction contract is a construction contract under which the amount payable for the construction work is equal to or greater than 500 million monetary units, which currently equates to \$505 million.
- 3.33 Proposed regulation 5B details the requirements of an alternative dispute resolution mechanism that must be contained within the contract for the parties to opt out of the scheme and 5B(c) ‘requires 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 the resolution of the payment dispute by a court or arbitration process’.²⁴
- 3.34 The Committee was informed during the public briefing that no other jurisdictions have opt out provisions. In the written questions to the Department, the Committee asked why this provision had been included in the Bill and was advised:
- Some stakeholders considered that there should be a way of distinguishing between the treatment of very complex contractual arrangements as their complex nature does not necessarily suit the adjudication process currently under the Act. This situation is currently reflected to an extent in section 33(1)(a)(iv)(A) of the Act, where an adjudicator is required to dismiss a claim if satisfied that it is not possible to fairly make a decision due to the complexity of the matter. Queensland has also recognised this, where it distinguishes between ‘complex’ and other disputes and provides for additional time to make determinations. Distinguishing between ‘complex’ and other disputes in interstate legislation has been recommended by a number of different reviews.²⁵
- 3.35 Back-to-back contracting is a practice where a head contractor includes all of the terms of the contract with the principal (the client) in the contracts entered into with subcontractors. In turn, subcontractors will include all of these terms in contracts entered into with other subcontractors. The Murray Review identified that back-to-back contracting enables head contractors to transfer onerous and unfair contract terms and risks to subcontractors which further exacerbates existing power imbalances within the construction industry.
- 3.36 MEA expressed concern that the practice of back-to-back contracting ‘means that these clauses may be seen as “contracting out” of other parts of the Act’²⁶ and they are of the view that opt out provisions should not be available simply based on the monetary value of the head contract.

²⁴ Proposed regulation 5B(c)

²⁵ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 5.

²⁶ MEA, Submission No. 3, 2019, p. 4.

3.37 In response to these concerns, the Department advised the Committee:

The proposed opt-out will only allow parties to opt-out of the adjudication process provided under the Act. It does not allow the parties to opt-out of any other aspect of the Act.

The proposed opt-out will only apply to parties to very large contracts (where the value of the construction work to be undertaken under the contract is over \$505 million in value) who have agreed to opt-out. The \$505 million threshold applies to the value of the work to be undertaken under a single contract between the parties. It does not apply to an aggregate of contracts between the parties, or between other parties. The opt-out option will not apply to, or affect, lower tier sub-contractors unless their specific contract is also for construction work over \$505 million.

All the provisions of the Act will apply to contracts with a value of less than \$505 million, even if the head contract (or a lower tier contract) is over \$505 million. There will be no changes to small sub-contractor claims. Small sub-contractors will still be able to make payment claims in the same way they can do now.

All participants in the contract chain, large or small, will be protected through the requirement in proposed regulation 5B(c) that parties who have opted out must have a clause in their contract that requires them to keep the money flowing down the contract chain while they resolve their dispute. Failure to have such a clause will result in their contract failing to comply with the opt-out requirements, and the Act's adjudication process will automatically apply.²⁷

3.38 The Department confirmed that opt out provisions contained within a contract valued at less than \$505m would be invalid and the statutory dispute resolution process in the Act would apply to that contract:

It is the value of the construction work to be undertaken under the contract that determines whether the contract is eligible for application of the opt-out provision. Eligibility does not consider other aspects of the contract, such as the apportionment of liability between the parties, or the incorporation of terms from the head contract.

If the value of the contract is less than \$505 million, it is not a high value contract under the Act, and the opt-out provision will not apply...

All of the elements must be present for the opt-out provision to be effective and valid. The value of the construction work to be performed under the contract must be over \$505 million. The parties must agree to opt-out. The contract must have an alternative dispute resolution process that accords with the Regulations. The statutory dispute resolution process will apply if any of these elements are absent.²⁸

3.39 The Act continues to provide protections to lower tier contractors and subcontractors through Part 2 Division 1 Prohibited Provisions and Part 2 Division 2 Implied Provisions, along with proposed regulation 5B(c), as outlined by the Attorney-General during the explanatory speech:

This requirement retains the intention of the Act to keep the monies flowing through the contract chain even if there is a dispute, meaning that subcontractors will not be disadvantaged by non-payment of their invoices due to a dispute between those at the top of the contract chain.

²⁷ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 5.

²⁸ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 6.

Importantly, the other significant protections offered by the Act, such as the prohibition on detrimental clauses such as 'pay when paid' will remain in place. The ability to opt out will only apply to the dispute resolution process.²⁹

Committee's Comments

- 3.40 The Committee is satisfied that the opt out provisions contained within this Bill are only applicable to high value contracts where the parties to the contract expressly elect to opt out of the statutory dispute resolution process and these provisions will not adversely affect lower tier subcontractors.

Applying for adjudication – section 28 amendment

- 3.41 The proposed amendment alters the timeframe in which a party must undertake certain actions to apply for an adjudication, changing the timeframe from 90 days to 65 working days, and clarifying when the timeframe starts after an event giving rise to a payment dispute.
- 3.42 MEA expressed concern that the timeframe for applying for an adjudication is overly long and considered that, as discussed in the Murray Review, 25 business days is a more appropriate timeframe. The Murray Review discusses the different timeframes for applying for an adjudication between jurisdictions, noting that the timeframes used under the West Coast Model are significantly longer than the East Coast Model.³⁰

Committee's Comments

- 3.43 The proposed amendment is effectively changing the method of calculating the timeframe from days to working days, which is an immaterial change to the actual period.

Responding to an application for adjudication – section 29 amendment

- 3.44 The amendments to section 29 increase the timeframe to prepare and serve a response to an application for adjudication from 10 working days to 15 working days, as well as removing the implied requirement for the respondent to include documentation upon which they will rely that has already been provided by the applicant.
- 3.45 HIA support the increased timeframe for responding to an application for adjudication. MEA suggested that a provision should be inserted into the Bill that would be consistent with recommendation 41 of the Murray Review which states 'the legislation should prohibit a respondent from including in its adjudication response any reasons

²⁹ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Explanatory Speech*, Draft Daily Hansard, 15 May 2019, p. 18, <http://www.territorystories.nt.gov.au/jspui/handle/10070/307367>.

³⁰ J Murray, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Australian Government, December 2017, p. 168.

for withholding payment unless those reasons have already been included in a payment schedule provided to the claimant.³¹

- 3.46 The Murray Review analysis and subsequent recommendation regarding providing reasons for withholding payments not included in a payment schedule focusses on the East Coast Model. While there are some variations within the East Coast Model, a person who has been served a payment claim can respond to the claim by providing a payment schedule to the claimant which details the amount (if any) that the respondent proposes to pay and reasons why the amount is less than what is claimed. If the respondent does not provide a payment schedule in response to the payment claim by the prescribed due date, then the respondent becomes liable for the full amount in the payment claim.
- 3.47 The West Coast Model does not use the term payment schedule. In the Northern Territory, if a construction contract does not contain written provisions about how a party is to make a payment claim, then the implied provisions within the Act apply. The implied provisions require that when a payment claim is made, the respondent must either pay the amount stipulated in the claim or respond by issuing a notice of dispute detailing why the claim should be rejected or the components of the claim that are disputed and the reasons for the dispute.
- 3.48 In the comparison of the two models, the Murray Review notes that in the West Coast Model a 'party who does not respond to a payment claim by way of a payment schedule is not automatically liable to pay the claimed amount.'³²
- 3.49 The Committee sought comments from the Department on the provision proposed by MEA and was advised:

Recommendation 41 of the Murray Review is predicated on adoption of the East Coast model, which heavily regulates the process of invoicing and responding to an invoice. It requires the service of a formal payment claim and payment schedules, even before the matter is referred to adjudication as a dispute amongst the parties. It also requires the respondent to provide formal detailed reasons for not accepting the payment claim and limits the respondent's response in the subsequent adjudication process to those initial reasons.

Under the West Coast model, the right to seek adjudication arises when a respondent fails to pay a payment claim when it is due, only pays part of the claim, or rejects or disputes all or part of the claim. It is only at the point where an applicant has applied for adjudication that the respondent is required to formally provide reasons (though there is nothing preventing a respondent explaining why it disputes the payment claim prior to an application being lodged).

This reflects the Act's preservation of the parties' freedom to manage their contract as they see best, acknowledging the fact that the respondent and applicant may well discuss the invoice before any real dispute emerges. The East Coast model, and the Murray Recommendation, overlays the contractual right the respondent has to query an invoice.³³

³¹J Murray, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Australian Government, December 2017, p. 189.

³²J Murray, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Australian Government, December 2017, p. 27.

³³Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, pp. 6-7.

Committee's Comments

3.50 The Committee is satisfied with the explanation provided by the Department.

Liquidated damages – section 33 amendment

3.51 Proposed section 33(1B) states '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'. Liquidated damages clauses are commonly included in construction contracts and are a mechanism through which one party can claim monetary compensation for losses that occur as a result of the other party's failure to deliver works, goods or services on time.

3.52 HIA 'does not consider that it is appropriate for an adjudicator to determine and deal with liquidated damages' and is of the view that 'in making an adjudication for liquidated damages such as elongation claims under a contract an adjudicator would likely need to consider much more information than is currently before them. This would confuse and potentially slow down the process.'³⁴ HIA have recommended this proposed amendment be removed from the Bill.

3.53 The *Review of the Construction Contracts (Security of Payments) Act (NT): Issues Paper* asks the question of whether the Act should be amended to exclude liquidated damages, which suggests that adjudicators are already able to include them in their determinations. Further, the Explanatory Statement notes this new section 'clarifies that where a construction contract makes provision for the assessment of liquidated damages, the adjudicator may assess those liquidated damages and include that assessment in its determination'.³⁵

3.54 The Committee sought confirmation from the Department that under the current Act, adjudicators are able to assess and include liquidated damages in a determination and was advised:

In determining a payment claim, the Act requires the adjudicator to consider how the entitlement to payment is established under the contract. This will include an assessment of the works required to be undertaken and the agreed pricing for those works.

Contracts often provide further considerations that influence payment entitlements, such as rectification of defects at no cost (warranties), and clauses that provide for compensation where a party has breached the contract (liquidated damages). Where those liquidated damages go to, for example, a failure to do certain work, or failure to do it to a certain standard, those failures will influence the amount the applicant is entitled to be paid under the contract.

While most adjudicators consider entitlement to liquidated damages when assessing an award, the Act could benefit from clarifying that this is permitted.³⁶

³⁴ HIA, Submission No. 2, 2019, p. 5.

³⁵ Explanatory Statement, Construction Contracts (Security of Payments) Legislation Amendment Bill 2019, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 5.

³⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 7.

Committee's Comments

3.55 The Committee is satisfied that this amendment is to clarify that adjudicators can assess and include liquidated damages in their determinations and this does not expand the scope of the existing provisions within the Act.

Publication of adjudicators' decision – section 54 amendment

3.56 Section 54 of the Act requires the Construction Contracts Registrar to make available for public inspection the results of decisions made by adjudicators but the identities of the parties to the adjudication must not be published. Further, the Registrar must not publish any information that has been identified by the adjudicator as not suitable for publication because of its confidential nature.

3.57 Clause 25 of the Bill proposes to insert subsection 54(3) which will allow the Registrar to provide 'relevant information regarding the result or a report of the decision of a registered adjudicator to a related regulatory body.' The examples of related regulatory bodies provided are the Australian Building and Construction Commissioner and the Director of Building Control. HIA oppose this amendment stating that it would:

enable the Director of Building Control to use the information provided to them by the Registrar as evidence of wrongdoing and for prosecutorial purposes under the broad powers conferred by ... the Building Act. Rapid adjudication is an interim resolution of a private civil dispute. The mere fact that a party is subjected to the adjudication process and may be ordered to pay an adjudicated sum is not conclusive of any wrong doing. Adjudicated outcomes are for the parties and should not be used by regulators for unrelated purposes.³⁷

3.58 In regard to clause 25, the Explanatory Statement notes:

This clause clarifies that the Registrar may provide relevant information arising from a decision of an adjudicator (be it a determination or dismissal) to related regulatory bodies such as the Australian Building and Construction Commissioner, building practitioner regulators, or the registrar or administrator of similar construction contract dispute resolution schemes to that established under this Act.³⁸

3.59 The Committee was informed by the Department that this information is not currently shared between the Registrar and related regulatory bodies and:

Authority to share information was identified as an issue following service of a notice to provide information on the Registrar by the Australian Building and Construction Commission in relation to an investigation it was conducting into possible breaches of the Commonwealth Building Code. That compulsion notice was subject to sanctions if the notice was not complied with.

It would be appropriate for the Registrar to have authority to disclose relevant information to regulatory bodies without recourse to threatening sanction.³⁹

3.60 The Committee was further advised that information shared by the Registrar could not be used by the Director of Building Control for prosecutorial purposes:

³⁷ HIA, Submission No. 2, 2019, pp. 5-6.

³⁸ Explanatory Statement, Construction Contracts (Security of Payments) Legislation Amendment Bill 2019, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 6.

³⁹ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 8.

Information that establishes a pattern of repeated wilful non-payment of sub-contractors for reasons other than genuine dispute might be given to the Director of Building Control for further investigation and potential remediation of a building practitioner's conduct. That would not, however, result in a prosecution as it is presently not an offence to not pay, or delay payment, to sub-contractors.⁴⁰

Committee's Comments

3.61 The Committee is satisfied with the explanations provided by the Department.

Registering adjudicators – section 52 amendment

3.62 The Bill proposes to alter the time for which an adjudicator is registered from an indefinite registration to a fixed five year period. Registered adjudicators will be able to apply for renewal prior to the expiry of their registration, or following the expiry by making a new application.

3.63 HIA stated it 'is not aware of any issues with and has received no adverse feedback from members as to the current registration requirements'⁴¹ and considers that the amendment is 'unnecessary and would add cost and red tape to the security of payments regime'.⁴²

3.64 At the public briefing, the Department advised the Committee:

Mutual recognition has been highlighting to us that when we have interstate adjudicators come and apply for mutual recognition here, we have to accept them because they are already registered. We then lose track of—is their registration still current in their home jurisdiction and things like that. In part because we have a number of adjudicators that are registered, they have not really been practicing for quite a while now so it is a bit of a mechanism there to keep it tidy for want of a better description.

We are looking at having a five-year registration period. Re-registration will be reasonably simple. It is just a matter of them re-applying. There is a small fee ... that is the same as what the application is, \$135 at the moment just to encourage those who want to continue to participate to participate.⁴³

Committee's Comments

3.65 The explanation provided by the Department appears reasonable and the proposed amendment should not place onerous administrative or financial burdens on adjudicators.

Reviewable decisions

3.66 The Bill proposes a number of amendments that will transfer the jurisdiction for reviewable decisions listed in Schedule 2 from the Local Court to the Northern Territory Civil and Administrative Tribunal (NTCAT). MEA consider that 'referring

⁴⁰ Department of the Attorney-General and Justice, *Responses to Written Questions*, <https://parliament.nt.gov.au/committees/EPSC/92-2019>, p. 8

⁴¹ HIA, Submission No. 2, 2019, p. 5.

⁴² HIA, Submission No. 2, 2019, p. 5.

⁴³ Public Briefing, Committee Transcript, 20 May 2019, p. 4.

these issues back to another adjudicator will further reduce costs and time for participants without compromising impartiality.⁴⁴

- 3.67 Four of the five reviewable decisions relate to the registration or disqualification of an adjudicator which are made by the Construction Contracts Registrar who is appointed by the Minister. The other reviewable decision, is a decision of an appointed adjudicator to dismiss an application.

Committee's Comments

- 3.68 As these are administrative decisions, NTCAT is the appropriate body to review such decisions.

⁴⁴ MEA, Submission No. 3, 2019, p. 5.

Appendix A: Submissions Received and Public Briefing

Submissions Received

1. Civil Contractors Federation NT Ltd
2. Housing Industry Australia
3. Master Electricians Australia

Public Briefing – Darwin 20 May 2019

- Ms Jenni Daniel-Yee: Director Legal Policy, Department of the Attorney-General and Justice
- Mr Douglas Burns: Senior Policy Lawyer, Department of the Attorney-General and Justice

Note: Copies of submissions and briefing transcript are available at:

<https://parliament.nt.gov.au/committees/EPSC/92-2019>

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