ECONOMIC POLICY SCRUTINY COMMITTEE

RESPONSES BY THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO WRITTEN QUESTIONS FROM THE COMMITTEE

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) LEGISLATION AMENDMENT BILL 2019

Murray Review

1. Master Electricians Australia stated that they largely support the proposed changes but noted that at the Building Minister Forum Meeting in early 2019, all Ministers agreed that changes to security of payment legislation should be contracted based on the Murray Review.

a. Are the proposed changes consistent with the recommendations from the Murray Review?

AGD Response:

No.

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 'agreed 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'. Recommendation 85 of the Murray Review called for mandated use of project specific trust accounts for projects over $1 million. Jurisdictions have not reached consensus on whether project trusts are a suitable vehicle for securing payments, let alone whether they should be mandatory.

b. Where changes are not consistent, what are the reasons for the deviation?

AGD Response:

As noted above for question 1. a., 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.

In addition to local stakeholders calling for retention of the West Coast model, numerous interstate industry and jurisdictional reports on security of payments laws have expressed preference for the simpler, fairer, light touch approach of the West Coast model over the more complex East Coast model. A number of submissions to the Murray Review also expressed preference for the West Coast model.

c. Are further amendments anticipated to implement recommendations from the Review?

AGD Response:

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 (for example, the Territory Act protects adjudicators, appointers and the Registrar from civil and criminal liability, whereas recommendation 74 of the Murray Review only calls for protection of adjudicators). There is currently no intention to amend the Act to adopt recommendations contained in the Murray Review that introduce complex and rigid processes.

Definition of construction contract

2. Master Electricians Australia raised concerns that the proposed definition of construction contract is overly broad, will add complexity to the system and they imply that the amendment may allow payment claims to be made where there is no contractual entitlement.

a. Under the current Act, are parties able to make payment claims for work performed prior to the expiry or termination of a construction contract?

AGD Response:

Yes.

b. Will the amended definition expand the scope of payment claims that can be made?

AGD Response:

No.

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.

3. The proposed amendment to the definition in section 5(1A) refers to a contract that has expired or been terminated, however the amended definition of payment claim under proposed subsections 7A(1)(c) and 7A(1)(d) only reference contracts that have been terminated, not contracts that have expired.

a. Why does s. 5(1A) include expired and terminated contracts while ss. 7A(1)(c) and 7A(1)(d) only includes terminated contracts?

AGD Response:

The amendments to the definitions of construction contract and payment claim seek to clarify that payment claims can be made for work done during the contract even though the contract is no longer in operation. Sections 7A(1)(c) and (d) should also apply to expired contracts. This can be addressed through a Consideration in Detail Stage amendment.

b. Does the wording of ss. 7A(1)(c) and 7A(1)(d) prevent a party to an expired contract from lodging a payment claim and subsequent application for an adjudication of a payment dispute?

AGD Response:

As currently drafted, there is that possibility. As noted above for question 3. a., this can be addressed through a Consideration in Detail Stage amendment.

Definition of payment claim

4. The Civil Contractors Federation NT believe proposed subsection 7A(2) and example 2 (rolling invoices) create uncertainty about the timing of when a payment dispute arises and the subsequent timeframe to lodge an application for adjudication. They consider that there is a conflict between the proposed amendment and section 8 of the Act.

a. Where a contract allows for rolling invoices and a payment claim is made for amounts included in a previous payment claim that is not subject to a determination, what is the impact on the timeframe in which a party can apply for an adjudication?

AGD Response:

The timeframe will be set by the new invoice.

b. In the example contained within the Civil Contractors Federation NT submission, would the applicant be able to include the amounts lodged in the first payment claim in the subsequent payment claim?

AGD Response:

Yes, 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.

5. Housing Industry Australia do not support the inclusion of proposed subsection 7A(2) and the examples in the Bill. HIA do not consider it appropriate that adjudicators be empowered to effectively exercise judicial discretion in permitting applications to continue that fail to comply with the statutory criteria. The Explanatory Statement discusses non-compliant applications in regards to proposed subsections 27(a)(c) and 33(1A).

a. Why is it appropriate for adjudicators to exercise discretion under subsection 33(1A) in deciding to continue with a non-compliant application as opposed to advising the applicant to withdraw the application and resubmit a compliant application?

AGD Response:

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.

b. What guidance will be provided to adjudicators to determine when a non-compliant application should continue to be assessed?

AGD Response:

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.

High Value construction contracts

6. Master Electricians Australia (MEA) do not support allowing parties to a high value construction contract to opt out of the statutory dispute resolution process where the contract includes an alternative dispute resolution mechanism in accordance with the requirements prescribed by regulation. MEA expressed concern about back-to-back contracting and that the opt out clause may be seen as contracting out of other parts of the Act.

a. Given that no other jurisdiction has opt out provisions for high value contracts, why has the provision been proposed?

AGD Response:

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.

b. What provisions of the Act will ensure that subcontractors are not disadvantaged by the inclusion of an opt out clause in the contract between the head contractor and the principal?

AGD Response:

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.

c. If a contractor and subcontractor entered into a back-to-back contract which included the opt out clause but the contract amount was less than the prescribed amount, would the opt out clause be invalid?

AGD Response:

Yes.

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.

c.i. If the clause was deemed to be invalid, would the statutory dispute resolution process apply to that contract?

AGD Response:

Yes.

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.

Responding to an application for adjudication

7. Master Electricians Australia suggest 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 for withholding payment unless those reasons have already been included in a payment schedule provided to the claimant.'

a. Was consideration given to incorporating a provision consistent with recommendation 41 to prohibit a respondent from including any reasons for withholding payment that were not already included in the notice of dispute issued to the claimant?

AGD Response:

No.

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.

b. If consideration was given, what were the reason for not including a provision?

AGD Response:

As noted in response to question 7. a., recommendation 41 of the Murray Review is predicated on adoption of the East Coast model. Local stakeholders have continuously advocated for establishment and retention of the West Coast model. Adopting recommendation 41 of the Murray Review on its own would generate internal inconsistencies in the operation of the Act.

Liquidated damages

8. Housing Industry Australia stated they do not consider it appropriate for adjudicators to determine liquidated damages, however the Explanatory Statement and 2017 legislative review issues paper suggest that adjudicators are already empowered to include liquidated damages in a determination.

a. Are adjudicators already able to assess and include liquidated damages in their determination or is the amendment expanding the scope of what can be included in the determination?

AGD Response:

Yes.

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.

Publication of adjudicators' decisions

9. Housing Industry Australia do not support proposed subsection 54(3) as they consider that an adjudicator's determination is not conclusive of any wrongdoing and the information should not be used by the Director of Building Control for prosecutorial purposes.

a. Is information currently shared between the Registrar and related regulatory bodies?

AGD Response:

No.

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.

b. Will information shared by the Registrar be able to be used by the Director of Building Control for prosecutorial purposes?

AGD Response:

No.

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.