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Litchfield Room, Level 3, Parliament House, Darwin

Members: Mr Tony Sievers MLA (Chair), Member for Brennan
Ms Kate Worden MLA, Member for Sanderson
Mrs Lia Finocchiaro MLA, Member for Spillett
Mr Yingiya Guyula MLA, Member for Nhulunbuy
Mr Lawrence Costa MLA, Member for Arafura

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

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) LEGISLATION AMENDMENT BILL 2019

Department of Attorney-General and Justice

Mr CHAIR: On behalf of the committee, I welcome everyone to this public briefing into the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019. From the Department of Attorney-General and Justice, I welcome to the table to give evidence to the committee: Ms Jenni Daniel-Yee, Director Legal Policy; and Mr Douglas Burns, Senior Policy Lawyer.

Thank you for coming before the committee today. We have Lia Finocchiaro, Kate Worden and Mark Guyula, and on the phone we have the Member for Arafura, Mr Costa. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public briefing which is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website.

If at any time during the briefing, you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

Could you each please state your name and the capacity in which you appearing here today. Ms Daniel-Yee, you may also make an opening statement if you like.

Ms DANIEL-YEE: Jenni Daniel-Yee, I am the Director of Legal Policy with the Department of Attorney-General and Justice.

Mr BURNS: Douglas Burns, I am a Senior Policy Lawyer with the Department of Attorney-General and Justice.

Ms DANIEL-YEE: I will not make an opening statement but I will hand you to Doug.

Mr BURNS: In a nutshell, the Construction Contracts (Security of Payments) Act is one of a number around the country that provide for a low cost dispute adjudication scheme for construction-related contracts. There are two models essentially in operation in Australia at the moment. The West Coast model, which has the Western Australia and Northern Territory schemes, and that provides a simple process up and down the contract chain to allow both sub-contracts and contractors to bring payment disputes.

Up and down the eastern seaboard, including through to South Australia you have the East Coast model, which is slightly different. That provides a slightly more complex dual payment system that establishes a one-way statutory right of payment up the contract chain that is outside of and separate to the rights of the parties under the contract.

The Northern Territory and Western Australian schemes are closely mirrored on the United Kingdom's *Housing Grants, Construction and Regeneration Act* which was made in 1996.

The purpose of these amendments that are in this Bill today are to streamline and resolve some ambiguities. If you like, I can take you through some of those.

Mr CHAIR: That would be great, Douglas.

Mr BURNS: The primary aim is to clarify when a payment dispute arises, when adjudication may occur and how determinations may be enforced. These have all been informed by stakeholder consultation and input as well as a review of some of the cases that have come before the Territory courts and also informed by the Western Australian experience.

In essence, we are clarifying when the Act may be used to resolve payment disputes, which are either arising from a performance or non-performance of obligations under the contract. To do that, we are amending the definition of 'construction contracts' under section 5 to include a new subsection 5(1)(a) that states that the contract remains a contract for the purposes of the Act, even if the contract has expired or has been terminated.

Part of the purpose for that 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. At this stage it is slightly unclear that was actually the case.

We are also going to move the definition of 'payment claim' from the general definitions in section 4 to a standalone section 7A and clarify that it will consist of any amount owing under the contract in relation to the performance or non-performance of the obligations. Then we provide some examples of that. In part again, it is to clarify that where a payment claim has been made but it has not been adjudicated at the time, that is still a valid payment claim. For example, where it has been included in a previous claim but it has been subsumed by a subsequent claim—rolling claims where you have rolling invoices. If something has not been paid, you can then roll that over into the next one. At the moment, it again is unclear as to whether it is included or not.

Also, we plan to include claims that have not been dealt with substantively because of procedural non-compliance. The application was wrong or things like that, so it was struck out before it even got a chance to go ahead.

We are also amending section 27, which is in relation to restrictions of when somebody may apply for adjudication. To make it perfectly clear and to support those previous amendments I just mentioned, unless the matter has already been dealt with through an adjudicator determining the dispute, the parties should be able to bring an application to have that decided.

Further, we are amending section 28 which is the process of applying for adjudication, to clarify the time frames in which to bring an application to start on the day after the event, giving rise to the payment. So, you have an invoice which says pay within 30 days, for example; on the 31st day of issuing that invoice that is when the right to start a payment dispute commences. The Act pretty much says that now, but the way it is worded is a little tricky, and there has been confusion as to which day. We are clarifying that for industry.

We are also making it a little easier for respondents by amending section 29 to remove the implied requirement that they had to provide everything that they wish to rely upon, which also up until these amendments, meant they had to provide everything the applicant had already supplied. There is a bit of doubling up and it just seems superfluous. To streamline that process a bit, the respondent can just say they also rely on what the applicant submitted.

We are also standardising working days. At the moment, we use a number of terms. There is 'day', 'business day' and 'working day' and all of those have different implications for when things occur. We are making a standardised 'working day' which is anything other than a Saturday, Sunday or public holiday. Also reflecting the way industry operates, we are excluding from Christmas Day—from 25 December—through to the 7 January in the following year, reflecting that is when industry shuts down. So, it is considered unfair to have the process running when there is nobody in the office.

We are also having a look at modifying some of the adjudicator processes. We are inserting a new provision in section 30 that enables an appointer to consult with the parties as to the qualifications of the adjudicator to be appointed. This is from a bit of feedback from industry which suggested that, at times, there have been adjudicators appointed that may not be as specialised in an area as what the claim goes to. We are giving them the opportunity to consult. That does not interact with the time frames though. The appointer still has five days under the Act in which to appoint somebody, but it gives them a little more flexibility.

In section 30 we are enabling the appointer or the Registrar in default of the appointer, to substitute an adjudicator. There have been a couple of cases where an adjudicator has fallen ill or for other reasons, they have taken on a matter then they have not been able to finish it. The default at the moment is, it has to run through the 10-day period in which to make the decision to then be deemed to be dismissed before they can start again. In this case, we are saying if the adjudicator says I cannot do it, we can appoint another one and it does not interrupt the flow of the process.

Another one, is providing the option of opting out for higher value construction contracts. Queensland, in some amendments they made a couple of years ago, instituted a two-tier system where there was what they considered high value contracts and operated a slightly different system for that.

We have found that where you get very sophisticated participants who have a very high value contract, they generally are able to manage the process themselves. They refer off to International Dispute Resolution and things like that.

We have taken on that feedback and are proposing to allow them to contract out of the Act, which is currently prohibited for everyone. We are looking at setting that at $500m, it is obviously extremely high value and complex contract. That only applies to those particular contractors, it does not then flow through. Everyone else who is underneath that will still retain all the protections of the scheme.

In relation to that, both parties to that high value construction contract will have to agree to it first of all, that they will opt out. Then they have to have a dispute resolution mechanism that is built into the contract that is pretty much the same as what the process is there now.

What we are also doing, is in terms of the very small contracts, currently under the *Community Justice Centre Act* disputes that are less than $10 000 can be adjudicated by them. A very low cost option, from memory it costs about $500 to run a process through there…

That is a very low number and has not taken into account inflation, since the Act first came in 2004. We are removing that statutory cap and replacing it with an amount that can be prescribed in regulations and we are developing regulations at the moment that will set that at 30 000 monetary units. Effectively tripling what can be heard under there.

The final thing is transferring jurisdiction from the Local Court to the NTCAT for certain administrative reviews relating to disqualification of an adjudicator. If an adjudicator refuses to disqualify themselves, or does disqualify themselves for whatever reason, that is currently reviewable. That will go over to NTCAT. The same of dismissing an application without determination, will also go over. The party aggrieved can say, well they actually should have made a decision, there was ample evidence. NTCAT will then consider whether that is the case and if NTCAT agrees, they will refer it back to the adjudicator with a direction to adjudicate the matter. It allows for the continued adjudication of those matters.

The other thing going over to NTCAT is a review of the registrar's refusal to register an adjudicator or a decision to cancel an adjudicator's registration.

Mr CHAIR: Anything else Douglas?

Mr BURNS: They are the main aspects of the Bill.

Mr CHAIR: I will open up to the panel in a minute. I have one question, when you say you consulted with the stakeholders, have you got a list of them?

Mr BURNS: Yes, we do. Back in October 2017, we released an issues paper and we sent that out to all the industry associations, judicial officers and interstate regulators. It was also published on our website. We received, unfortunately, only two responses. One was from the Law Society and one was from the Housing Industry Association.

Based on those and the general feedback that we have been receiving throughout the period that the Act had been in operation, we came up with some amendments which we then went back to industry on in March and April of this year. We sent out an outline of what the proposals were and then we followed those up with face-to-face meetings. That was with Contractor Accreditation Limited, the Civil Contractor's Association, the Housing Industry Association, and the Master Builders Association.

We also sent an outline to the Law Society and I understand their Law Reform Committee had a look at it but we have not had a formal response from them.

Mrs FINOCCHIARO: You mentioned that you would be removing the statutory cap for disputes in—what did you call it?

Mr BURNS: *Community Justice Centre Act.* That is the Community Justice Centre; a low-cost alternative dispute resolution service that is run through the department.

Mrs FINOCCHIARO: Is that increase in the cap because it is being utilised or it is not being utilised and you foresee that this is a good place for these issues to be disputed?

Mr BURNS: It is not being utilised all that much from the information we have. That is, in part, due to the monetary threshold that you are talking about there.

Mrs FINOCCHIARO: At 30,000 monetary units, would the department then expect that a lot of adjudications would end up there?

Mr BURNS: Not a lot, no.

Mrs FINOCCHIARO: That is still quite a low…

Mr BURNS: It is. We would expect to see a slight increase on what has been going on there.

Mrs FINOCCHIARO: And that is cheaper and more expeditious is it?

Mr BURNS: Yes.

Mrs FINOCCHIARO: Okay. Were there also amendments in the Act—if I recall the minister saying around the adjudicator timeframes? Something about five years, if you had not done an adjudication in five years, a registration every five years, something like that?

Mr BURNS: Yes, in relation to registration—at the moment registration is open-ended so once you apply for registration, you are registered for life effectively. What we are doing is introducing a fixed period, which aligns us with the rest of the country.

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—I think we had in the second reading speech—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.

Mrs FINOCCHIARO: I want to ask about the procedural non-compliant applications. You mentioned something like the change to the section deals with applications that could not be dealt with due to procedural non-compliance. How would that work? If you have not met the requirement—do you mind just walking me through that in a bit more detail?

Mr BURNS: At the moment, if you do not meet any of the requirements at all, you cannot bring an application. What we are saying is—and that may be in terms of some of the information you may have provided and things like that are outlined in the regulations— provided you have a claim and it is a valid claim and there is a claim on the merits there and you have omitted something that is non-material to running it, then you should be allowed to continue to do it rather than being automatically cancelled.

Mrs FINOCCHIARO: And the adjudicator will make that determination?

Mr BURNS: Yes.

Mrs FINOCCHIARO: Okay. Does that impact the timeframes as well?

Mr BURNS: No.

Mrs FINOCCHIARO: So, it complies with the timeframe that will take place?

Mr BURNS: Yes.

Mrs FINOCCHIARO: It is just within the package of the application?

Mr BURNS: Yes. What should happen at the moment is if the adjudicator deemed dismissal or dismissed it because it failed to comply, they then have to go back and start again. Whereas, we are saying if it is materially okay, then it should continue.

Mrs FINOCCHIARO: How does that affect the respondent?

Mr BURNS: It does not prejudice the respondent because the respondent has all the information that is salient to making that decision on the merits. It is just one issue of non-compliance.

Mrs FINOCCHIARO: Yes. Otherwise, that would have—yes, that is interesting. Okay.

Mr BURNS: Looking at it from the point of view that it is something that is looking to the terms of the contract—both parties have signed up to the contract. All their payment terms are set out, the work schedules and all that are all set out. The respondent is not prejudiced insofar as they have been participating in the whole construction process. It is just a dispute over the payment and where there is a technical hang-up, that dispute is not being processed so we are amending it in order to streamline that bit.

Mrs FINOCCHIARO: Really, in those situations what should happen now is that then the application is able to remedy it. I wonder how many of those instances where it has been rejected never come back?

Mr BURNS: Well, there are quite a few because they may have run out of time. If the time period is expired, they then are statute barred from modifying it and correcting those minor errors and then bringing it back.

The other thing we are doing in that space in section 30 is to say that where an applicant has made an application and has withdrawn it because they maybe have identified that there are some material issues with it—currently they would be prohibited from reapplying because they have already made an application. We are correcting that and saying, okay, if you have made an application but it has not been heard or determined, and you have withdrawn that, you can go away and make those amendments and bring it back and reapply, provided you are within your limit.

Mrs FINOCCHIARO: Okay.

Mr BURNS: This one you are talking about, though, is, I suppose, a fall-back insofar as there are time limit issues. If it is not an issue to determine the claim, then it should go ahead.

Mrs FINOCCHIARO: That is it.

Mr CHAIR: Thanks, Lia. Kate, do you have any more questions?

Mrs WORDEN: No.

Mr CHAIR: Mark, no? Lawrence, do you have any further questions?

Committee Secretary: He has dropped out. I have asked him to text me because the phone has dropped out as well, because he dropped out for so long. I have asked him to text me if he wants to come back in.

Mr CHAIR: Thanks, Jennifer.

Mrs FINOCCHIARO: Can I ask one last question?

Mr CHAIR: Of course, Lia.

Mrs FINOCCHIARO: On the opting out. What other jurisdictions do that? Currently, we do not have any opt-out provisions?

Mr BURNS: No, we do not. We will be the first jurisdiction to do that.

Mrs FINOCCHIARO: Right, okay. Where was that model from—overseas, is it?

Mr BURNS: No. The overall legislation is modelled on the Western Australian version of the English version.

Mrs FINOCCHIARO: That is right, yes.

Mr BURNS: We are the only jurisdiction that has an opt-out proposal.

Mrs FINOCCHIARO: Right. And that is drawn from the feedback the department received over the life of the operation of the Act?

Mr BURNS: Yes.

Mrs FINOCCHIARO: Right. But in any event, they would then have to pursue this dispute resolution under the contract?

Mr BURNS: Under the contract, which would be along very similar lines to what the Act is at the moment.

Mrs FINOCCHIARO: Okay, thank you.

Mr CHAIR: Thanks Lia. On behalf of the committee, we thank you for coming in today and answering our questions. From here, we will have a look through it. Any further questions, the committee will decide if we would like to bring you back for some more questions. Thank you for your time today.

Mr BURNS: Certainly, no worries. Thank you,

The committee suspended.
