



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Northern Territory Economic Policy Scrutiny Committee

Construction Contracts (Security of Payments) Legislation Amendment Bill 2019

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of mix of companies residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over \$100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 15 May 2019, the Northern Territory (NT) Legislative Assembly referred the *Construction Contracts (Security of Payments) Legislation Amendment Bill 2019 (Bill)* to the Economic Policy Scrutiny Committee (**Committee**) for inquiry and report.

HIA provides this submission in response to the Bill.

HIA is supportive, in principle, of a rapid adjudication scheme to assist in achieving the timely and cost-effective resolution of payment disputes, thereby assisting in prompt cash-flow through to a contracting business.

HIA considers that the Bill provides a measured response to certain concerns in relation to the current security of payment arrangements.

For instance, the amendment clarifying the definition of 'working day' is supported. Whilst most construction businesses (and many law firms) close over Christmas and don't re-open until well into January, the Christmas period has been seen by some as an opportunity to serve payment claims or have claims for payment of construction work adjudicated under the *Construction Contracts (Security of Payment) Act 2004 (Act)* in the hope these claims or applications will go unanswered or the other party will be ill-prepared to defend them.

Clause 12 of the Bill is also supported. Increasing the timeframes in which a party must respond to a payment claim, to 15 working days seems sensible given the current incongruence between the claimant having 90 days (or 65 working days under the Bill) to prepare a claim, whilst the respondent only has 10 working days to prepare a response. There is also currently some uncertainty as to when the commencement of the adjudication application timeframe commences. HIA is supportive of moves that would clarify this.

There are several aspects of the Bill that HIA does not support including:

- the proposed amendment to the definition of a 'construction contract' (section 5 (1A));
- the proposed amendment to the meaning of 'payment claim' (section 7A (2));
- how liquidated damages are to be dealt with (section 33 (1B));
- the introduction of a finite time period for the registration of adjudicators (section 52); and
- the sharing of an adjudicators' decision with other regulatory bodies (section 54(3)).

HIA elaborates on these items below.

2. THE BILL

2.1 CONSTRUCTION CONTRACT (SECTION 5 (1A))

The proposed amendment to section 5 outlined in the Bill states that a contract remains a contract for the purposes of the Act even if the contract has expired or has been terminated.

The primary purpose of rapid adjudication is to adjudicate unpaid or disputed progress payment claims.

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.

HIA does not support the amendment and recommends section 5(1A) of the Bill be deleted.

2.2 MEANING OF PAYMENT CLAIM (SECTION 7A (2))

Of concern are the examples associated with section 7A (2) which set out the matters that may be included in a payment claim. For instance, example 3 refers to “*An amount that was included in a claim that was not dealt with substantively because of procedural non-compliance*”.

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.

HIA does not support this amendment. HIA recommends that subsection 7A(2) and the examples be deleted.

2.3 LIQUIDATED DAMAGES (SECTION 33(1B))

Section 33(1B) of the Bill proposes to give to an adjudicator the power to determine and assess liquidated damages if the construction contract provides for liquidated damages.

HIA does not consider that it is appropriate for an adjudicator to determine and deal with liquidated damages. Although the NT model is much more inquisitorial than the restrictive east coast approach, the purpose of adjudication is to have a fast and cost effective means of deciding whether the monies subject of a claim are due and owing.

In essence, an adjudicator’s decision is an interim determination relating to monies owed for construction work and services completed under a construction contract.

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.

HIA does not support this clause and recommend that it be deleted.

2.4 REGISTRATION OF ADJUDICATORS (SECTION 52)

HIA is not aware of any issues with and has received no adverse feedback from members as to the current registration requirements. HIA is supportive of ensuring that adjudicators have a solid knowledge of contract management and administration in relation to construction projects in the residential building and construction industry.

HIA’s view is that it is unnecessary and would add cost and red tape to the security of payments regime to introduce the proposed requirement that adjudicators be registered for a finite time.

2.5 PUBLICATION OF ADJUDICATORS’ DECISION (SECTION 54 (3))

HIA understands that sharing information is common between state/territory agencies and the Commonwealth. However, the proposed amendment to section 54 outlined in the Bill 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 section 7 of 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.

HIA does not support the amendment in its current form and recommends that it be deleted.

