

Northern Territory

Construction Contracts (Security of Payments) Legislation Amendment Bill 2019

J ODwyer / June 2019



Introduction

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au

Industry Issues

The Building and Construction industry has a long and well documented problem with non payment and insolvencies plaguing the industry and leaving subcontractors unpaid for work completed. Many subcontractors are then not considered secured creditors and as such then fall to the back of the priority list for payment behind employees and secured creditors.

ASIC data over the last 5 years for the Northern Territory shows that 20% or one in five insolvencies are in the Construction industry.

	Total	Construction	Percentage
	NT all industry insolvencies	Industry	
2013/14	38	5	13.16%
2014/15	54	12	22.22%
2015/16	76	13	17.11%
2016/17	52	11	21.15%
2017/18	58	16	27.59%
Total	278	57	20.50%

Source Australian insolvency statistics Released: May 2019 Table 1A.1.1 - Companies entering EXAD–Region and industry summary, ANNUAL, QUARTERLY

The construction industry has reported a significant number of issues and these have been identified and explained in numerous reports, However the Murray Review we believe is the most comprehensive explanation analysis and examination of corrective measures done in Australia on this topic. The report can be found here <https://docs.jobs.gov.au/documents/review-security-payment-laws>. MEA would suggest that the changes being made in the current bill do not go far enough in terms of protecting businesses, compared to the detailed analysis of Mr Murray's review. In particular Mr Murray has identified that the Northern Territory legislation as it currently stands is particularly lacking in forms of statutory protection. Mr Murray says at page 27

“the West Coast Model (including the NT) only provides legislative assistance where the construction contract does not contain express terms regarding payment claims and their assessment and payment, by implying terms to deal with such situations.”

The Murray review details the following issues

Issues with security of payment legislation...

a) With the exception of Queensland, none of the existing state and territory legislations provide any effective 'security' of payment where a party higher up the contractual chain becomes insolvent.

b) The legislative regimes are unduly complex and this has discouraged their usage and caused confusion.

c) There are questions around the process of appointing adjudicators; the adequacy of qualifications, training and grading of adjudicators; and the variable quality of adjudication decisions.

d) There is an imbalance of bargaining power within the contractual chain and the practice of passing on contractual risks has resulted in the imposition of unfair contract terms that operate to prevent payment to the party that has carried out construction work.

e) There are suggestions that acts of intimidation and retributive conduct by head contractors discourage subcontractors from pursuing their entitlements.

f) Late payment continues to be a major issue for the construction industry.

MEA suggests in particular that the NT Government should also include in the Bill additional recommendations from the Murray review including (section number below refer to the Murray review reference section)

- 1. The legislation should apply to the residential housing sector so as to enable a residential contractor/builder to make a progress payment claim against an owner-occupier. Section 10.3*
- 2. To avoid confusion within industry the use of the expression 'reference date' should be abandoned. The legislation should provide that a person who has undertaken to carry out construction work (or who has undertaken to supply related goods and services) under a construction contract is able to make a payment claim for every named month, or more frequently if so provided under the contract. Section 11.1*
- 3. 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. Section 67(2) of the Building Industry Fairness (Security of Payment) Bill 2017 (Qld) provides a suitable model. Section 11.1*
- 4. The legislation should provide that the due date for when a progress payment is to be paid is:*

the date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made. Section 11.3

5. *The legislation should require that, unless the construction contract provides for a longer period, a progress payment claim must be made within 6 months after the construction work was last carried out or the related goods and services were supplied. Section 12.3*
6. *The legislation should provide that a function of the Regulator is to appoint adjudicators (whether nominated by the authorised nominating authority, or otherwise) to determine an adjudication application. Section 13.2*
7. *The legislation should provide the following timelines for lodging an adjudication application:*
 - A) *Where the amount set out in the payment schedule is less than the claimed amount, the adjudication application must be lodged within 10 business days after the claimant received the payment schedule, or*
 - B) *Where the respondent, having provided a payment schedule, has nonetheless failed to pay the whole or part of the scheduled amount by the due date for payment, the adjudication application must be lodged within 20 business days after the due date for payment, or*
 - C) *Where:*
 - a. *a respondent has failed to provide a payment schedule, and*
 - b. *a respondent has failed to pay the whole or part of the claimed amount, and*
 - c. *the claimant has notified the respondent of their intention to apply for adjudication, the adjudication application must be lodged within 10 business days after the end of the 5 business day period referred to in the claimant's notice.*

Sections 17(3)(c), (d) and (e) of the NSW Act provide suitable models. Section 13.1
8. *The legislation should provide that a function of the Regulator is to appoint adjudicators (whether nominated by the authorised nominating authority, or otherwise) to determine an adjudication application. Section 13.2*
9. *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. Section 13.3*
10. *The legislation should expressly provide that, where an adjudicator has committed jurisdictional error of law in a part of the adjudication decision which does not affect the whole of the decision, a court with the power to sever that affected part of the decision may do so and allow the remainder of the decision to be enforceable.*

Section 100(4) of the Queensland Act provides a suitable model. Section 13.10

11. *The legislation should make it an offence to use coercive and threatening conduct, whether directly or indirectly, in relation to a person’s statutory rights to, or claim for, a progress payment under the legislation.*

Clause 32A of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model. Section 15.2

12. *The legislation should void a contractual term that purports to make a right to claim or receive payment, or a right to claim an extension of time, conditional upon giving notice where compliance with the notice requirements would:*

- a. not be reasonably possible; or*
- b. be unreasonably onerous; or*
- c. serve no commercial purpose. Section 16.6*

13. *A deemed statutory trust model should apply to all parts of the contractual payment chain for construction projects over \$1 million. The deemed statutory trust model outlined in the Collins Inquiry provides a suitable basis. Section 17.4*

Proposed changes

MEA 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.

Clauses 9 and 10 of Bill

MEA wishes to raise concerns over the special arrangements being considered for “High Value Construction” contracts. MEA is particularly concerned that by excluding these projects and enabling power to Owners or Builders over subcontractors that flow on or “back to back” contracting terms means that these clauses may be seen as “contracting out” of other parts of the Act. Subcontractors even major subcontractors usually experience a power imbalance when Tier One builders and developers use their significant market power, in a small economy of the NT, to drive untenable outcomes and by enforcing particular dispute procedures or adjudicators. It is our view that larger projects should not gain this exemption simply because of their size in building contract.

Clause 12

MEA is concerned that a 65 day period for applying for adjudications is overly long. As described in the Murray review a period not exceeding about 25 business days for lodging and adjudication has been suggested. We have not seen any information in the discussion paper that indicates why such a long period is needed.

Clause 13

MEA also questions this amendment based on the Murray report recommendation that only those reasons stated in the payment schedule. We suggest that a similar provision be adopted in this legislation.

Clauses 15 and 21

MEA is concerned that in reviewing decision that the Territory is suggesting that these decisions be referred to the NTCAT. The aim of adjudication is for a high speed low cost jurisdiction and in general should be based primarily on the papers. We note that previously these cases were reviewed by a local court and as such a faster claim process may well be achieved via the NTCAT, however again we do believe that referring issues back to another adjudicator will further reduce costs and time for participants without compromising impartiality.

In general we see this as a small incremental step in improving security of payments however we encourage the Northern Territory Government to take further significant change by adopting a more progressive system such as deemed statutory trusts and outlawing unfair contract terms.



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