

## CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) LEGISLATION AMENDMENT BILL 2019

(Serial 92)

**Ms FYLES:** Madam Speaker, we need to ensure that our regulatory framework and associated legislation works efficiently and is in the best interest of Territorians and their businesses.

I thank the deputy leader of the opposition for her contribution to debate and for her indication of support to the bill.

I also thank the Member for Nelson for his indication of support and noted his comments and I certainly agree around dispute clarity—that is important—and hopefully during my summing up speech will be able to provide an explanation on the recommended amendments. I also thank my ministerial colleagues, the Member for Wanguri and the Member for Drysdale for their contribution to debate

I also acknowledge the Member for Fong Lim for his indication of support and his contribution to debate, and yes, you are correct, the head contract has a requirement to keep the money flowing further down the chain and that it is only to one contract, not the lower down contractors that would be of any dispute—an important point.

I note two members opposite nodding at me, both of who I assume have worked in this area of law and the Member for Drysdale also paid comment on this—as the minister for Infrastructure it is something she deals with every day in terms of working with construction companies.

We have consulted on the improvements to the Construction Contract (Security of Payments) Act and that is why we are making these legislation amendments today.

It is important that there is an efficient and speedy process for adjudication of payment disputes with our construction industry—try and keep them out the courts. We have listened to Territorians in the development of this bill and feedback received during the consultation period from stakeholders has been incorporated.

The consideration in detail stage amendment I propose is based on the scrutiny committee's report. I thank the scrutiny committee for the time it took to look at this bill.

The Construction Contracts (Security of Payments) Act 2004, the Community Justice Centre Act 2005, and the Construction Contracts (Security of Payments) Regulations 2005—the amendments to these acts are to:

- clarify when a payment dispute arises and when adjudication may occur and how determinations may be enforced
- standardise the time frames in which something must be done under the Construction Contracts (Security of Payments) Act 2004 to that of business days and define the meaning of the term
- modify adjudication time frames and revise the processes of appointing adjudicators
- provide for opting out of adjudication under the Construction Contracts (Security of Payments) Act 2004 for high-value construction contracts
- 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
- 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.

Once the bill has passed, the Department of the Attorney-General and Justice will develop regulations to establish the monetary limit for the adjudications that may be undertaken by the Director of the Community Justice Centre.

The department will also confirm the changes and timing of commencement of the amendments with key stakeholder groups.

We have heard from the members who have contributed to the debate on the history of this bill. It deals with a range of issues that the department and stakeholders have identified over time. An issues paper entitled, Review of the Construction Contracts (Security of Payments) Act was released for consultation on 27 October 2017, with responses due back to the department by 27 November 2017.

The issues paper was provided directly to industry associations, judicial officers, the Construction and Contracts Registrar and interstate regulators. It was also published on the Department of the Attorney General and Justice website. Responses were received from a number of stakeholders. Amendments to the Act were developed on the basis of stakeholder feedback to that issues paper.

Further consultation on the proposed amendments was also taken with stakeholders in March and April of this year. The further consultation was undertaken firstly through provision of an online—of the proposals, which then followed face-to-face discussions with Contractor Accreditation Limited, the Civil Contractors Federation, the Housing Industry Association and the Master Builders Association. An outline was also sent to the Law Society.

Overall, stakeholders are very supportive of the proposed amendments and the scrutiny committee's report more than adequately discusses those select areas where the Housing Industry Association and the Civil Contractors Federations view diverge.

I thank all of the stakeholders for their contribution to the debate.

Other jurisdictions have enacted similar legislation: New South Wales has a bill that was enacted in 1999, and bills have been enacted throughout the states and territories, the final being Tasmania in 2009.

Most jurisdictions model their security of payment laws on the New South Wales act; however, they have varied in differing extents in respect to the applications.

The most notable variations was the Western Australian Construction Contracts Act 2004, which mirrored closely the United Kingdom's Housing Grants, Construction and Regeneration Act 1996. Based on extensive consultation, the Territory adopted the WA Act as a base for its security of payment laws with minor variations to suit the local industry conditions and preferences.

There are key features of this bill that I will take the time to speak to. The bill seeks to clarify that when a payment dispute arises, when an adjudication may occur and how the determinations will be enforced. The requirements about contractor payment claims is being modified to make it fairer to the contractor seeking payment.

Honourable members have all heard stories and complaints from small to medium businesses that have not been paid money they are owed and the significant impact that has on their business. Currently if a contractor makes an application to have a payment claim adjudicated, the adjudication can only occur if the payment claim and the application have been made within strict time frames and in accordance with all requirements of the act.

If those criteria are not met the adjudicator must dismiss the application and the contractor is then precluded from making another application on the outstanding amount. This is because the Act prohibits further application from the same issue regardless of whether or not it has been determined.

If a contractor's application has a minor defect, such as referring to another party's trading name, rather than a legal name, the contractor will not be able to seek adjudication under the Act. They will instead have to pursue the outstanding amount through the courts as a breach of contract. The amendments will allow contractors in such situations to seek adjudication where the defect would not prevent proper consideration of the issue on its merits. Under the circumstances provided, the Act had been substantially complied with and the contractor would be able to undertake the adjudication process, rather than the expensive and time consuming court action.

The respondent, the contractor who the payments claim is made against, would not be unduly affected by these changes, as the respondent would have already been on notice of the nature of the issue.

Being a party to the construction contract and having been given an invoice to pay and then being subsequently served with an adjudication of application, the respondent is well and truly aware of the issue.

Under the circumstances it is unfair that a contractor is prevented from pursuing a quick and inexpensive resolution due to a minor technical matter.

The bill gives reasoning to this effect by amending the definition of 'construction contract' under section 5 to include a new subsection 5(1)(a) that states that 'a contract remains a contract for the purpose of the Act even if the contract has been expired or terminated'; moving the definition of 'payment claim' from the general definition section under section 4 to a stand-alone section 7A; and clarifies that a payment claim may consist of any amount owing under a construction contract in relation to the performance or non-performance obligation accrued under the contract unless the matter has already been the subject of a determination under section 33(1)(b).

I will provide some examples of what constitutes a payment claim whereby a payment claim may include an amount that was included in a previous payment claim but was not dealt with at that time; that was included in a previous claim but has since been subsumed into a later claim such as a rolling claim; that was included in a claim that was not dealt with substantially because of procedural non-compliance.

The bill also removes the exclusion of the construction of the artistic works from the definition of 'construction work' under section 6(2)(c). This is so payment disputes surrounding such work can be adjudicated under the Act, reflecting the increasing incorporation of large artistic construction projects within broader construction projects.

The bill amends section 27A, restrictions on when a party may apply. This is for adjudication 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 where a further payment dispute has arisen before the current application has been determined. This enables the party to include both matters in one application, such as where the contract permits rolling invoicing.

A previous application was dismissed without determination and the party has withdrawn the application before it was determined where the party has identified a defect in the application and wishes to submit a complaint application.

Section 28(3) will be amended to clarify that the time frame in which application for adjudication starts on the day after the event giving rise to the payment dispute. For example, the time frame in which an application for adjudication of a payment dispute would start the day after the due date of an invoice if the party who was sent the invoice had not paid it on that due date.

Section 29 is amended to remove the implied requirement of the party responding to an application having to provide material that they wish to rely on that had already been provided in the application. This thereby removes the need to double up on material that has already been provided to the adjudicator.

A new provision in section 33 will be inserted that clarifies where a construction contract makes provision for the asset of liquidated damages, the adjudicator may assess those liquidated damages and include the assessment in its determination.

The current requirement under section 34(3) for the adjudicator to consent to the respective parties will be removed. The amendment will permit an adjudicator to determine related payment disputes at the same time without the consent of any or all parties concerned.

Further, where the adjudicator has formed the opinion that it would not adversely affect the ability of the adjudicator to determine the respective disputes on their merits, a requirement in section 39 will be inserted that an adjudicator provide written notice to the registrar of any applications that have been deemed to have been dismissed by the operation of section 33(2) and the new reasons for the deemed dismissal.

The time frame of the bill also seeks to standardise the time frames in which something must be done under the Construction Contracts (Security and Payments) Act 2004. Standardising time frames makes it simpler and easier for businesses to resolve disputes through the adjudication process.

These amendments are being made by the industry's general understanding of a working day. General references to days in the Act will be replaced with 'working day', which is quite straightforward.

The bill also modifies the adjudication time frames and reverses the processes for appointing adjudicators.

A new provision in section 30 will be inserted:

*...that enables an appointer to consult with the parties on the qualifications of the adjudicator to be appointed to preside over the application...*

A new provision in section 30 will be inserted:

*...which enables an appointer (or the Registrar) to appoint a substitute adjudicator to consider an application if the originally appointed adjudicator is, having accepted the appointment, unable to complete the adjudication for any reason...*

A new provision in section 33 will be inserted:

*...that enables an adjudicator to dismiss a second or subsequent application on the same dispute to avoid the situation of multiple applications on the same subject being conducted at the same time;...*

*...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;...*

The bill amends the provisions relating to the registration of adjudicators prescribing that the registration is limited to a five year period and has processes on the renewal.

It has opting out for high-value contracts. The bill provides for opting out of an adjudication under Construction Contracts (Security of Payments) Act 2004 for high-value construction contracts. Contracts over \$505m only arise through the occasional very large-scale project and are generally between the project principal and the head contractor. We have listened to stakeholder feedback in this space.

Where sophisticated parties with equal bargaining power developed their own tailored dispute resolution mechanism, it is appropriate they should be able to manage their affairs as they see fit through their own contractual arrangements.

The Community Justice Centre, in recognition of the scheme's availability to payments disputes over small amounts, has been diminished over time. The bill seeks to amend the Community Justice Centre Act 2005: to provide a mechanism which will allow the monetary limit for low-value adjudications to be undertaken by the Director of the Community Justice Centre.

Regulations will be made under the Community Justice Centre Act 2005 to increase that limit from \$10 000 to \$30 000 monetary units or equivalent \$33 300 for the 2018–19 financial year. Setting the level of monetary units will allow for the automatic indexation in line with CPI.

Finally, the bill seeks to transfer administrative reviews from the Local Court to NTCAT for decisions made under sections 31(3), 33(1)(a), 52(4), 52(4)(b) and 52(5).

The bill was referred to the Economic Policy Scrutiny Committee, I thank them for their report. I was pleased the committee has recommended the passage and note the recommended addresses which I will address during the committee stage Debate.

I cannot stress enough that the amendments to this bill will seek to protect and enhance the ability for particularly small contractors to have payment disputes resolved in a quick and efficient manner—which we have all talked about today in this House.

It is important we have the most efficient and effective mechanisms in place for contract disputes. These amendments will provide clarity on time frames and the processes for industry as well as for the option to opt out for those dispute resolution for high-value contracts. The amendments are important for the industry.

I will conclude my comments. I sincerely thank the staff at the Department of the Attorney-General and Justice who have led the development of this bill and of course the hardworking office of Parliamentary Counsel.

I commend the bill to the House.

Motion agreed to; bill read a second time.

**Consideration in detail.**

Clauses 1 to 7 taken together and agreed to.

Clause 8:

**Ms FYLES (Attorney-General and Justice):** Mr Deputy Speaker, it feels like déjà vu.

I move amendment 1 to clause 8 of the proposed section 7A(1)(c) and (d) be amended to insert the words 'expired' or 'between that has' and 'been terminated'.

This amendment to clause 8 of the bill seeks to address a technical omission that was identified by the hardworking Economic Policy Scrutiny Committee during its review of the bill. The proposed section 7A(1)(c) and (d) together with the proposed section 51(a) amendment to the definition of construction contract is to make it clear that the Act may be used to resolve disputes over payments arriving from performance or non-performance obligations under the contract, even though the contract is no longer in operation, as currently drafted section 7A(1)(c) and (d) only apply to the contracts that should have been terminated, however it was intended that these provisions should also apply to the expired contracts. This amendment addresses that omission.

Amendment agreed to.

Clause 8, as amended, agreed to.

Remainder of the Bill, by leave, taken as a whole and agreed to.

**Ms FYLES (Attorney-General and Justice):** Mr Deputy Speaker, I move that the Bill be now read a third time.

Motion agreed to, Bill read a third time.

Assembly suspended.