

[Act 2002 No 133]



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The *Building and Construction Industry Security of Payment Act 1999* entitles certain persons who carry out construction work (or who supply related goods and services) under construction contracts to timely payment for the work they carry out and the goods and services they supply. The Act also provides a procedure for securing the payments to which persons are, under the Act, entitled.

The object of this Bill is to amend the Act as follows:

- (a) to provide that progress payments to which persons are entitled under the Act include final payments and single or one-off payments,
- (b) to provide for interest to be payable on unpaid progress payments,

* Amended in committee—see table at end of volume.

Explanatory note

- (c) to provide claimants with the option of having their payment claims adjudicated under the Act rather than having to take court action to recover the amount owing,
- (d) to provide that an adjudicator's determination of a payment claim may be set out in an adjudication certificate which may then be filed as a judgment for a debt in any court of competent jurisdiction,
- (e) to make a number of other miscellaneous amendments for the purposes of enhancing the effect and operation of the Act,
- (f) to make a number of other amendments of a minor or consequential nature.

Later references in this explanatory note to the carrying out of construction work under a construction contract are taken to include references to the supplying of related goods and services under such a contract.

The Bill also amends the *Contractors Debts Act 1997* to provide that a claimant who has filed an adjudication certificate may be issued with a debt certificate under section 7 of that Act in order to obtain payment of a debt under that Act from the defaulting contractor's principal.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Building and Construction Industry Security of Payment Act 1999* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Contractors Debts Act 1997* set out in Schedule 2.

Schedule 1 Amendment of Building and Construction Industry Security of Payment Act 1999

Amendments relating to rights to progress payments

Schedule 1 [1] restates the object of the Act. At present, the Act is meant to ensure that a person who carries out construction work under a construction contract is entitled to receive and recover specified progress payments. The proposed

Explanatory note

amendment makes it clear that the object of the Act is to ensure that the entitlement to progress payments relates to work that is undertaken to be carried out under a construction contract. **Schedule 1 [13]–[16], [19] and [20]** also make amendments to clarify that the Act extends to construction work that is undertaken to be carried out.

Schedule 1 [2] makes it clear that the Act creates a statutory entitlement to a progress payment regardless of whether the construction contract under which the work is undertaken to be carried out makes provision for progress payments.

Schedule 1 [7] amends the definition of *progress payment* to make it clear that the Act creates an entitlement not only to payments that are in the nature of instalments, but also to final payments and to single or one-off payments.

Schedule 1 [12] provides that the entitlement to a progress payment arises (in those cases where the construction contract does not expressly provide for the matter) at the end of the month in which the construction work was first carried out and at the end of each subsequent month. **Schedule 1 [11]** is a consequential amendment.

Schedule 1 [17] provides that a progress payment becomes due and payable (in those cases where the construction contract does not expressly provide for the matter) within 10 business days (rather than 2 weeks) after the payment claim is made in relation to the progress payment.

Schedule 1 [18] provides for interest to be payable on the unpaid amount of a progress payment. The amendment also provides that, if a progress payment becomes due and payable, the claimant will be able to exercise a lien over any unfixed plant or materials supplied by the claimant in connection with the work.

Schedule 1 [21] extends the meaning of a *pay when paid provision* of a construction contract (such provisions currently have no effect in relation to any payment for construction work) so that the term will also cover those provisions of a contract that purport to make the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

Amendments relating to payment claims

Schedule 1 [22] makes it clear that a payment claim may be made by a person who claims to be entitled to a progress payment.

Schedule 1 [23] requires the payment claim to indicate the amount of the progress payment the claimant claims to be due.

Schedule 1 [24] allows certain amounts to be included in a payment claim (eg money held under the construction contract that is due for release). The amendment also provides that a payment claim can only be served within 12 months from when the construction work to which the claim relates was last carried out.

Amendments relating to the recovery of payment claims and adjudication of disputes

Schedule 1 [25] provides that, if the respondent does not provide a payment schedule in response to a payment claim and fails to pay the claimed amount on time, the claimant may either take legal action in a court to recover the claimed amount or make an adjudication application in relation to the payment claim.

Schedule 1 [26] makes it clear that, if the claimant commences proceedings to recover the claimed amount in a court, the respondent cannot bring a cross-claim against the claimant or raise defences in relation to matters arising under the construction contract. However, it is to be noted that the Act does not preclude a respondent from raising any defence (or from taking action) in other civil proceedings in respect of a construction contract (see existing section 32 of the Act).

Schedule 1 [27] provides that, if the respondent provided a payment schedule in response to a payment claim but fails to pay the scheduled amount on time, the claimant may either take legal action in a court to recover the scheduled amount or make an adjudication application in relation to the payment claim. **Schedule 1 [28]** makes a similar amendment to that made by **Schedule 1 [26]**.

Schedule 1 [29] replaces section 17 of the Act with a new section that specifies the additional circumstances in which adjudication applications may be made as an alternative to taking court action. The new section provides that, if the respondent has not provided a payment schedule, the claimant can only make an adjudication application if the respondent is given a further opportunity to provide a payment schedule. An adjudication application must be made to an authorised nominating authority and the authority may charge an application fee. The authorised nominating authority is required to refer an adjudication application to an adjudicator. **Schedule 1 [30] and [39]** are consequential amendments.

Schedule 1 [32] provides that the respondent may lodge an adjudication response in relation to an adjudication application served on the respondent only if the respondent has provided a payment schedule to the claimant. The amendment also limits what the respondent can include in an adjudication response. **Schedule 1 [31]** is a consequential amendment.

Explanatory note

Schedule 1 [33] makes it clear that any conference conducted by an adjudicator in determining an adjudication application must be informal and be conducted without legal representation.

Schedule 1 [34] enables an adjudicator to determine, along with the adjudicated amount and the due date for paying that amount, the rate of interest payable on the adjudicated amount. **Schedule 1 [35]** recognises that an adjudicator cannot, when determining an adjudication application, consider the payment schedule if the respondent has not provided one to the claimant.

Schedule 1 [36] inserts additional provisions in relation to adjudicators' determinations. In particular, clerical mistakes, minor errors and miscalculations in adjudicators' determinations may be corrected.

Schedule 1 [37] replaces sections 23 and 24 of the Act (which currently provide that the respondent must pay the adjudicated amount to the claimant or give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them as well as providing for the security to be held in a designated trust account). **Schedule 1 [3], [4], [6] and [40]** are consequential on the repeal of those sections.

The proposed new sections 23 and 24 provide that the respondent must pay the adjudicated amount as determined by the adjudicator on or before the relevant date referred to in section 23. If the respondent fails to pay the adjudicated amount on time, the claimant may request the authorised nominating authority to provide an adjudication certificate. The claimant may also serve notice on the respondent of the claimant's intention to suspend construction work under the contract. An adjudication certificate must specify the adjudicated amount (which may also include the amount of interest payable on the adjudicated amount as well as the respondent's share of any adjudication fees).

Schedule 1 [38] provides that the filing of an adjudication certificate will have the same effect as a judgment for a debt in a court of competent jurisdiction. The claimant will be required to file an affidavit with the adjudication certificate stating that the adjudicated amount has not been paid. If the respondent seeks to set the judgment aside, the respondent will be prevented from bringing any cross-claim against the claimant or from raising defences under the construction contract.

Schedule 1 [41] provides that the right of a claimant to suspend work under a construction contract exists up until 3 business days after the date the claimant receives payment for the amount that is payable by the respondent under the Act. The amendment also provides that if the claimant, in exercising the right to suspend

work, incurs any loss or expenses as the result of the respondent removing work from the contract, the respondent will be liable to pay for the amount of any such loss or expenses as a part of a subsequent payment claim.

Amendments relating to authorised nominating authorities and adjudicators

Schedule 1 [42] provides that the Minister may restrict the number of authorised nominating authorities who may nominate adjudicators for the purposes of the Act.

Schedule 1 [43] provides that the refusal of a person's application for authority to nominate adjudicators is not reviewable by the Administrative Decisions Tribunal if the refusal is on the ground that the application would result in the maximum number of authorised nominating authorities being exceeded.

Schedule 1 [44] enables an authorised nominating authority to charge fees for services provided by the authority in connection with adjudication applications made to the authority. The amendment also provides that an authorised nominating authority must provide the Minister with information relating to the authority's activities under the Act if requested by the Minister to do so.

Schedule 1 [45] provides that the claimant and respondent are each liable to contribute to an adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine regardless of the circumstances.

Schedule 1 [46] restates the provision that excludes an adjudicator from liability for things done or omitted to be done in good faith in exercising functions under the Act. The new provision will extend the exclusion from liability to authorised nominating authorities and will apply to things done in the reasonable belief that they were done in exercising the adjudicator's or authority's functions under the Act.

Miscellaneous amendments

Schedule 1 [5] inserts consequential definitions.

Schedule 1 [8] and [9] amend the definition of *construction work* to make it clear that the carrying out of certain activities in relation to "works" that form part of land (eg power-lines, pipelines, industrial plant) are covered by the definition.

Schedule 1 [10] makes it clear that the term "related goods and services" in the Act can include either goods or services.

Schedule 1 [47] provides that notices served under the Act may be served in a manner provided under the relevant construction contract.

Explanatory note

Schedule 1 [48] restates the provision of the Act that prevents persons from contractually avoiding the Act. Under the new provision, a provision of any agreement that may be construed as an attempt to deter a person from taking action under the Act will be void.

Schedule 1 [49] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [50] provides that the amendments made by the proposed Act do not apply to or in respect of existing payment claims.

Schedule 2 Amendment of Contractors Debts Act 1997

The *Contractors Debts Act 1997* establishes an alternate debt recovery procedure that allows a person (eg tradespersons or suppliers) to whom money is owed by a defaulting contractor to recover from the contractor's principal in the situation where the principal owes money to the contractor. In order for the unpaid person to obtain payment of the money owed, a debt certificate must be issued under section 7 of the Act and the unpaid person must then serve a notice of claim on the principal (which operates as an assignment of the debt owed by the principal to the defaulting contractor).

Schedule 2 [2] amends section 7 of the Act to provide that a claimant who has filed an adjudication certificate that becomes a judgment for a debt under proposed section 25 of the *Building and Construction Industry Security of Payment Act 1999* (see Schedule 1 [38]) may be issued by the court with a debt certificate under section 7 in respect of the money owed by the defaulting contractor to the claimant. This will enable the claimant to obtain payment from the principal concerned.

Schedule 2 [1] makes it clear that references in the Act to work and materials extend to construction work and related goods and services within the meaning of the *Building and Construction Industry Security of Payment Act 1999*.