

[Act 1999 No 46]



New South Wales

## **Building and Construction Industry Security of Payment Bill 1999 (No 2)**

### **Explanatory note**

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

### **Overview of Bill**

The objects of this Bill are:

- (a) to entitle certain persons who carry out construction work (or who supply related goods and services) to timely payment for the work they carry out and the goods and services they supply, and
  - (b) to provide a procedure for securing payments to which persons become entitled under this Act, and
  - (c) to make consequential amendments to the *Commercial Arbitration Act 1984*, and
  - (d) to enact provisions of a savings or transitional nature.
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## Outline of provisions

### Part 1 Preliminary

**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** sets out the object of the proposed Act.

**Clause 4** defines certain words and expressions that are used in the proposed Act. These include the core concepts of *construction contract* (which means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party), *construction work* (which is defined in clause 5) and *related goods and services* (which is defined in clause 6).

**Clause 5** defines the expression *construction work* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

**Clause 6** defines the expression *related goods and services* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

**Clause 7** provides for the application of the proposed Act to all construction contracts, whether written or oral, or partly written and partly oral. Certain classes of contract are excluded from the proposed Act, as are certain classes of contractual provisions. Other classes of construction contract can be excluded from the proposed Act by regulations under the proposed Act.

### Part 2 Rights to progress payments

**Clause 8** provides that on and from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment. A *reference date* is a date ascertained in accordance with the terms of the construction contract as a date for making a claim for a progress payment or as a date by reference to which the amount of a progress payment is to be calculated or, if the contract contains no such terms, a date occurring at 4-weekly intervals from the commencement of construction work, or the supply of related goods and services, under the contract.

**Clause 9** provides for the amount of a progress payment to be ascertained in accordance with the terms of the construction contract or, if the contract contains no such terms, according to the value of construction work carried out, or related goods and services supplied, under the contract.

**Clause 10** provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.

**Clause 11** provides that a progress payment becomes due and payable in accordance with the terms of the construction contract or, if the contract contains no such terms, at the end of 2 weeks after a progress claim is made in relation to that payment under Part 3 of the proposed Act.

**Clause 12** provides that a “pay when paid” provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A “pay when paid” provision is a provision that makes one person’s payment dependent on another person’s payment.

## **Part 3 Procedure for recovering progress payments**

### **Division 1 Payment claims and payment schedules**

**Clause 13** enables a person who is entitled to a progress payment under proposed Part 2 (the *claimant*) to serve a payment claim on the person who is liable to make the payment. The claim will set out the amount to which the claimant claims entitlement.

**Clause 14** enables a person on whom a payment claim is made (the *respondent*) to reply to the claim by providing a payment schedule to the claimant. The schedule will set out how much the respondent proposes to pay the claimant and when.

**Clause 15** provides that a claimant will be able to recover the whole amount of his or her claim as a debt, and to suspend carrying out construction work, or supplying related goods and services, if the respondent fails to provide a payment schedule within the time allowed under clause 14.

**Clause 16** provides that a claimant will be able to recover the amount set out in the respondent’s payment schedule, and to suspend carrying out construction work, or supplying related goods and services, where the respondent provides the payment schedule within the time allowed under clause 14 but fails to pay that amount by the due date referred to in clause 11.

## **Division 2      Adjudication of disputes**

**Clause 17** enables a claimant to apply for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within 5 days after the claimant receives the payment schedule, and will be able to be made directly to an adjudicator agreed between the claimant and respondent or to an authority authorised to nominate adjudicators for the purposes of the proposed Act.

**Clause 18** requires an adjudicator to be a natural person and to have such qualifications, expertise and experience as are prescribed by the regulations, and prohibits a person from being an adjudicator in relation to a particular construction contract if the person is a party to the contract or in such circumstances as are prescribed by the regulations.

**Clause 19** provides that the appointment of an adjudicator is effected by the adjudicator causing notice of his or her acceptance of the adjudication application to be served on the claimant.

**Clause 20** enables the respondent to lodge with an adjudicator the respondent's response to the claimant's adjudication application.

**Clause 21** sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application.

**Clause 22** provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid.

**Clause 23** provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount to the claimant or give the claimant security for payment of that amount. Acceptable security will consist of a guarantee from a recognised financial institution, a deposit into a designated trust account or any other security agreed between the claimant and the respondent.

**Clause 24** deals with the establishment and operation of trust accounts that are used for the purposes of giving security as referred to in clause 23.

**Clause 25** provides that a claimant will be able to recover the adjudicated amount as a debt, and to suspend carrying out construction work, or supplying related goods and services, while the amount remains unpaid.

**Clause 26** enables a claimant to make a new adjudication application in the event that a previous application is not accepted by an adjudicator within 4 business days after it is made or if an adjudicator fails to determine the application within the time allowed under clause 21.

### **Division 3      Claimant's right to suspend construction work**

**Clause 27** entitles a claimant to suspend the carrying out of construction work (or the supply of related goods and services) if at least 2 business days have passed since notice of intention to do so has been given as referred to in clause 15, 16 or 25. A claimant who suspends the carrying out of construction work (or the supply of related goods and services) under the proposed section will be immune from civil liability as a consequence of doing so.

### **Division 4      General**

**Clause 28** enables the Minister administering the proposed Act to authorise persons as nominating authorities (to nominate adjudicators for the purposes of the proposed Act) and to withdraw any authority so given. The Minister's decisions in this regard will be reviewable by the Administrative Decisions Tribunal.

**Clause 29** provides for the fees payable to an adjudicator in relation to his or her adjudication of an adjudication application under proposed Division 2 of Part 3. In particular, an adjudicator will not be entitled to be paid any fees if he or she fails to determine such an application within the time allowed under clause 21.

**Clause 30** ensures that no action will lie against an adjudicator or any other person for anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the proposed Act.

**Clause 31** deals with the service of notices under the proposed Act.

**Clause 32** ensures that nothing done under the proposed Act will affect any civil proceedings arising under a construction contract, except that a court will be required to make appropriate set-offs and any orders necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.

## **Part 4 Miscellaneous**

**Clause 33** provides that the proposed Act is to bind the Crown.

**Clause 34** avoids any provision of an agreement that purports to exclude, modify or restrict the operation of the proposed Act.

**Clause 35** enables the Governor to make regulations for the purposes of the proposed Act. The clause also ensures that any regulation that affects the definition of *construction work* in clause 5 or *related goods and services* in clause 6, or that varies the application of the proposed Act under clause 7, will not apply to construction contracts entered into before the regulation takes effect.

**Clause 36** is a formal provision that gives effect to Schedule 1 (Amendment of other Acts).

**Clause 37** is a formal provision that gives effect to Schedule 2 (Savings and transitional provisions).

**Clause 38** requires the Minister administering the proposed Act to review the Act at the end of 3 years after its date of assent and to report to Parliament on the outcome of the review.

## Schedules

**Schedule 1** amends the *Commercial Arbitration Act 1984* so as to ensure that nothing in that Act affects the operation of Part 3 of the proposed Act.

**Schedule 2** contains savings and transitional provisions, of which:

- (a) clause 1 is a provision that enables the regulations to make provision of a savings or transitional nature as a consequence of the enactment of the proposed Act, and
- (b) clause 2 ensures that the proposed Act does not apply to construction contracts entered into before its commencement.