

## NEWSFLASH - SECURITY OF PAYMENT LEGISLATION UNDER REVIEW

As part of its commitment to improve confidence in the adjudication system administered under the Building and Construction Industry Security of Payment Act, the Government has circulated an issues paper with a range of proposals to amend the current legislation, specifically to assist subcontractor claimants. One of the key challenges faced by the Government in ensuring that the processes under the Act are not abused are through the various proposals under discussion, to strike a *“fair balance between curtailing the opportunity for ambush – claims”* while maintaining the Government's original purpose behind the introduction of the Act.

The current review of the NSW legislation is running in parallel to a review of the equivalent Security of Payment Legislation in Queensland. Some of the key areas subject of Government proposals to amend the legislation include the following:

1. A maximum period being specified under the Act between the commencement of work and the reference date of 90 days.
2. This proposal is in response to some industry practice whereby constructions contract terms may be used to extend the reference date beyond a reasonable period preventing as a consequence a claimant from the right to bring a payment claim.
3. Although arguably any unreasonable extension of the reference date to restrict a claimant's right to bring a claim under the Act is void under Section 34, it is suggested in the paper that an unreasonably delayed reference date will deter the claimants from making a payment claim.
4. Amend Act to ensure that the due date for payment does not extend beyond 30 days from the reference date.
5. Aside from whether this proposal is in response to the potential use of contractual terms extending the due date for payment beyond a reasonable period. For example if the due date for payment is specified as being 60-90,120 or more days from the reference date.
6. That the time for adjudication commences when the adjudicator has received both the adjudication application and response if any.
7. That the adjudication application and adjudication response if any be provided to the adjudicator at the same time.
8. It is considered that this will remove any potential for an adjudicator to be influenced by the arguments and reasons set out in the claimant's application before receiving and reviewing the response.
9. That payment claims also include a statement to the following effect:

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*“If the claim is not paid or otherwise dealt with in accordance with the procedures or periods prescribed by the Act the claimant will be legally entitled to pursue the claim under the adjudication process, or in certain circumstances, judgement may be entered against the principal for the full amount of the claim.”*

It is proposed that a warning of this type will alert respondents as to the possible consequence of failing to respond to a payment claim in accordance with the requirements of the Act.

A requirement for a respondent in its payment schedule to set out prescribed information including:

10. That the payment schedule is a payment schedule under the Act.
11. Identify the payment claim which is a payment schedule under the Act.
12. Identify the payment claim to which the schedule relates.
13. State the amount to be paid.
14. State the amount not to be paid.
15. State reasons for not paying any amount.

Further that the Act be amended to make clear that the further *“detailing, evidence, or explaining of a basis for rejecting a claim, is not considered a “new” reason.*

The government has invited submissions on preferred options for discouraging *“predatory claiming practices and dealing*

*with complex claims including whether the prohibition claims, including whether the prohibition on certain heads of claim will have a significant impact on subcontractors...”*

This request is in response to some claimants using the Act in a *“predatory manner which seeks to ambush”* surprise or overwhelm a respondent.

It is proposed that the choices available for dealing with such complex claims are to:

- Limit the material that can be put to both respondent and the adjudicator by excluding prohibited amounts from the claiming process; And/or
- Extending the time allowed for respondents to respond and adjudicators to adjudicate.

As to prohibited amounts, it is proposed that entitlement for claimants to claim certain amounts in their payment claims be prohibited. The prohibited amounts including:

- Prolongation claims (ie acceleration, delay, disruption or loss of productivity claims)
- Claims for breach of contract or breach of legislation;
- Or claims for latent conditions;
- Guidance for claimants, respondents and adjudicators to assist in the interpretation of excluded amounts

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be contained in the adjudication guidelines.

Clarification that all construction work claimed in the payment claim must have been performed in the proceeding 12 month period.

Currently and based upon a decision of the Court of Appeal NSW, the Act merely requires that some work for which payment is claimed and the payment claim has been performed in the 12 month period prior to service of the payment claim. It is suggested to avoid some claimants delaying claims to disadvantage respondents that the Act encourage claimants promptly.

That the Act make it clear that where an overpayment has occurred under the Act, a respondent be entitled to recover the difference quickly and without the need for costly legal action.

That interest be paid on all overpayments.

## REVIEW OF CONTRACTOR DEBTS

The discussion paper also proposes changes to the Contractors Debts Act 1997.

Some of the key options include:

- Smaller claims under \$100,000 be able to be commenced by subcontractor claimants under the Contractors Debts Act 1997 in an

alternative dispute resolution forum such as a tribunal similar to the CTTT.

- Consideration of the possibility of the use of Trusts to secure funds payable (principle progress payments) within the contractual chain. Encouragement by government to private sector to engage in continual improvement through the adoption of Government initiatives such as prequalification in an effort to ensure that parties in the contracting chain in construction exhibit standards of capability and behaviour required for satisfactory delivery of projects, including financial capability and stability.
- The review and regulation of the service costs associated with the determination of small claims including the costs of submitting a claim to a nominating authority and the fees charged by the adjudicator.

*If you would like any further information on this topic, please contact David Glinatsis, Solicitor Director, on (02) 8239 6502 or email [david.glinatsis@kreissonlegal.com.au](mailto:david.glinatsis@kreissonlegal.com.au)*

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