

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS AMENDMENT BILL 2014

Explanatory Notes

Short Title

The short title of the Bill is the Building and Construction Industry Payments Amendment Bill 2014.

Policy Objectives and the reasons for them

The *Building and Construction Industry Payments Act 2004* (the Act) provides a person with an entitlement to receive, and an ability to recover, progress payments if they undertake to carry out construction work, or supply related goods and services, under a construction contract. The Act establishes a procedure for making and responding to payment claims within statutory timeframes and for disputed or unpaid claims to be referred to adjudication for a decision.

Since the introduction of the Act, building industry stakeholders have raised a number of issues around its operation, including the timeframes for submitting payment claims and payment schedules, qualifications and the appointment process of adjudicators and the independence of authorised nominating authorities.

In December 2012 the Minister for Housing and Public Works released a discussion paper entitled 'Payment dispute resolution in the Queensland building and construction industry' to seek industry stakeholder feedback on the operations of the Act. Mr Andrew Wallace, barrister, was engaged as an independent consultant to review and assess the submissions received in response to the discussion paper and liaise with relevant stakeholders to clarify or seek further information on the issues being considered.

The 49 recommendations from Mr Wallace's final report dated 24 May 2013 offer a full suite of reforms to address the concerns raised by industry stakeholders from all sectors. The amendments in the Bill provide three main areas of reform which are based on the 49 recommendations contained within the Wallace Report, with the majority of these recommendations included within these broad areas of reform. These areas of reform address the significant issues which were raised by the stakeholders within the building and construction industry. The three main areas of reform are:

- Appointment of adjudicators and the adjudication process
- Amendment of timeframes for claimants and respondents
- Provision of additional information in adjudication response.

Achievement of policy objectives

The Bill amends the Act to align with the key areas of reform as set out below.

Appointment of Adjudicators and the Adjudication Process

The Bill establishes a single adjudication registry within the Queensland Building and Construction Commission (the Commission) to monitor performance and appoint adjudicators based on skills, knowledge and experience. Authorised nominating authorities will no longer undertake this function, removing the perception of conflicts of interest and bias in the appointment of adjudicators. This should result in the reduction of adjudication fees.

Adjudicators will also be required to determine if they have jurisdiction to make a decision and claimants will be able to withdraw an adjudication application if they choose to during the process.

Amendment of Timeframes for Claimants and Respondents

The Bill introduces a dual model regime to ensure a fairer system to address complex claims. For complex claims, where the claim is for more than \$750,000 (or a greater amount prescribed by regulation) or is for a latent condition or a time related cost, the time for a respondent to provide a payment schedule will be extended to 15 business days (from 10 business days). Timeframes will be extended to 30 business days if the payment claim for a progress payment is served more than 90 days after the date in the contract on which a claim for progress payment may be made.

The time for a respondent to provide an adjudication response will increase from five business days to 10 business days, with an extension to 15 business days for complex claims. For complex claims the adjudicator will be able to extend the time for an adjudication response by up to an additional 15 business days.

The definition of business days will exclude the three business days before Christmas until 10 business days after New Year's Day to reflect industry shut down. The time to lodge a payment claim will be reduced from 12 months to six months after the construction work was last carried out or the period worked out under the contract, whichever is later. The time to serve a final payment claim will be the later of the period worked out under the contract, 28 days after the end of the defects liability period under the contract, or 6 months after the construction work was last carried out.

Provision of Additional Information

Under the Bill, for complex claims, the respondent will be able to include in its adjudication response all relevant reasons for withholding payment, whether or not these matters were raised in the payment schedule. This will allow the adjudicator to fully consider the information relevant to the payment claim. However, if additional reasons for withholding payment are included in the payment schedule this can be taken into account by the adjudicator when apportioning the fees of the adjudication.

Alternative ways of achieving policy objectives

As the current system of resolving payment disputes in the building and construction industry in Queensland is set out in legislation, the only way of achieving the policy objectives is to amend the primary legislation.

Estimated cost for government implementation

There are no direct financial impacts on the State arising from the proposed amendments to the Act. The Commission has the capacity to absorb the costs associated with the implementation of this initiative.

Consistency with fundamental legislative principles

While the provisions of the Bill are consistent generally with the standards required to be met under the *Legislative Standards Act 1992*, a potential breach of fundamental legislative principles (FLP) is addressed below.

The Bill introduces a dual model regime for recovering progress payments under the Act. The Bill provides for a distinction between standard payment claims and complex payment claims. Extended timeframes will apply in relation to making and adjudicating complex payment claims.

A complex payment claim will be defined in the Act as including any payment claim over \$750,000 or, if a greater amount is prescribed by regulation, the greater amount. The fact that the threshold may be increased by regulation raises a potential FLP issue in that it may authorise the amendment of the Act by means other than another Act. The proposal to deal with these matters by a regulation can be justified on the basis that changes in the consumer price index or other financial circumstances may result in the threshold amount being no longer appropriate. Therefore the ability to set the threshold by a regulation is considered to be the most efficient and effective way of ensuring that the value remains appropriate.

Consultation

Mr Wallace undertook extensive consultation with industry stakeholders in the preparation of his final report, and additionally the Department of Housing and Public Works carried out an extensive review of the 49 recommendations with a committee comprising representatives from the Department of Housing and Public Works, the former Queensland Building Services Authority and the Australian Institute of Building.

In April 2014 communication on the proposed amendments occurred with key industry stakeholders and the current authorised nominating authorities and the proposed reforms were publicly announced more broadly to other industry stakeholders. All registered adjudicators were also invited to an information session to discuss the impacts of the reforms.

Consistency with legislation of other jurisdictions

The Act is based on similar New South Wales legislation however the reforms in the Bill are specific to the State of Queensland.

Notes on provisions

Clause 1 provides that the short title of the Act is the *Building and Construction Industry Payments Amendment Act 2014*.

Clause 2 provides that the amendment Act commences on a date to be fixed by proclamation.

Clause 3 provides that the Act amends the *Building and Construction Industry Payments Act 2004*.

Clause 4 amends section 4 (Effect of giving notice of claim of charge under Subcontractors' Charges Act 1974) by substituting a reference to section 19(2) in section 4(4)(a), deleting reference to an authorised nominating authority and replacing with registrar in section 4(4)(d)(ii), and deleting the words '34 or' in section 4(5).

Clause 5 amends section 17(2) by inserting paragraph (d) which provides that a payment claim must identify whether it is a standard payment claim or a complex payment claim. It also replaces section 17(4) to (6) with section 17(4).

Proposed new section 17(4) combines the provisions of the existing section 17(5) and (6).

Clause 6 inserts new section 17A.

Proposed new section 17A (Time requirements for payments claims) sets out the time requirements for payment claims that were formerly set out in section 17.

Subsection (2) provides that for payment claims that are not final payment claims, the claim must be served on the respondent within the later of the period, if any, worked out under the relevant construction contract and the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

Subsection (3) provides that if the payment claim relates to a final payment, the claim must be served within the later of the period, if any, worked out under the contract, 28 days after the last defects liability period (there may be more than one), if any, worked out under the relevant construction contract or 6 months after the later of completion of all construction work to be carried out under the contract or complete supply of related goods and services to be supplied under the contract.

Subsection (4) provides definitions of "defects liability period" and "final payment" for section 17.

Clause 7 provides for the omission of section 18(4) and (5).

Clause 8 inserts new section 18A.

Proposed new section 18A (Time requirements for payment schedules) sets out the time requirements for respondents to serve on a claimant a payment schedule for standard and complex payment claims.

Subsection (2) provides that a payment schedule for a standard payment claim must be served on the claimant within the earlier of the time, if any, required by the relevant construction contract and 10 business days after the payment claim is served.

Subsection (3) provides that a payment schedule for a complex payment claim must be served on the claimant within the earlier of the time, if any, required by the relevant construction contract and 15 business days after the complex payment claim is served (where the payment claim was served on the respondent 90 days or less after the reference date to which the claim relates) or 30 business days after the complex payment claim is served (where the payment claim was served on the respondent more than 90 days after the reference date to which the claim relates).

Clause 9 replaces section 19.

Proposed new section 19 (Consequences of not paying claimant if no payment schedule) makes altered provision for the consequences for a respondent of not paying the claimant if the respondent does not serve a payment schedule within the time provided for the respondent to serve a payment schedule.

Clause 10 amends section 20 (Consequences of not paying claimant under payment schedule).

Section 20(1)(b) is replaced. Section 20(4) is omitted.

Clause 11 inserts new section 20A (Notice required before starting proceedings to recover unpaid portion as a debt).

New section 20A provides that, before a claimant starts proceedings in a court of competent jurisdiction to recover the unpaid portion of a payment claim as a debt owing by the respondent, the claimant must first give the respondent notice, within 20 business days after the due date for payment, of the claimant's intention to start proceedings, and advising that the respondent may serve the claimant with a payment schedule within 5 business days after receiving the notice.

Clause 12 amends section 21 (Adjudication application). Adjudication applications will be made to the registrar and must be in the approved form and accompanied by the fee prescribed by regulation for the application. Adjudication applications will no longer be made to authorised nominating authorities.

Clause 13 amends section 23 (Appointment of adjudicator). These amendments provide that adjudication applications are to be referred by the registrar to an adjudicator.

Clause 14 replaces section 24 (Adjudication responses). Proposed new section 24 makes altered provision for the time in which adjudication responses are required depending on whether the claim is a standard claim or a complex claim.

Proposed section 24(4) provides that if the adjudication claim is about a standard claim the adjudication response can not include any reasons for withholding payment that were not included in the payment schedule when served on the claimant.

Proposed section 24(5) provides that if the adjudication claim is about a complex claim the adjudication response may include reasons for withholding payment whether or not those reasons were included in the payment schedule when served on the claimant.

Proposed new section 24A (Time requirements for adjudication response) makes altered provision for the time in which adjudication responses are required depending on whether the claim is a standard claim or a complex claim.

Proposed section 24A(2) provides that for standard payment claims the respondent must give the adjudicator the adjudication response within the later of 10 business days of receipt of the adjudication application or 7 business days after receipt of the adjudicator's acceptance of the adjudication application.

Proposed section 24A(3) provides that sections 24A(4) to (7) apply to complex payment claims.

Proposed section 24A(4) provides that for complex payment claims the respondent must give the adjudicator the adjudication response within the later of 15 business days of receipt of the adjudication application or 12 business days after receipt of the adjudicator's acceptance of the adjudication application.

Proposed section 24A(5) provides that for complex claims, the respondent may apply to the adjudicator for an extension of up to 15 additional business days to give the adjudication response.

Proposed section 24A(6) provides that the application in subsection (5) must be made within the later of 5 business days of receiving the adjudication application or 2 business days of receiving notice of the adjudicator's acceptance of the adjudication application.

Proposed section 24A(7) provides that if the application is granted the respondent must give the adjudication response no later than the end of the extension of time granted by the adjudicator.

Proposed new section 24(8) requires the respondent to serve the adjudication response on the claimant no more than two business days after it is given to the adjudicator.

Proposed new section 24B (Reply to new reasons for withholding payment) provides, for complex claims, that the claimant may give a reply when a respondent includes in an adjudication response reasons for withholding payment that were not included in the respondent's payment schedule.

Proposed section 24B(2) provides that the claimant may give the adjudicator a reply to the new reasons within 15 business days after receiving a copy of the adjudication response.

Proposed section 24B(3) provides that the claimant may apply to the adjudicator for an extension of time of up to 15 additional business days for the reply if, because of the complexity or volume of the new reasons, an extension of time is required to adequately prepare the claimant's reply.

Proposed section 24B(4) provides that the extension of time application must be made within 5 business days of receiving the adjudication response, giving reasons for the application.

Proposed section 24B(5) provides for the time in which the claimant must give the reply to the adjudicator where the claimant has requested an extension of time for the reply.

Proposed new section 24B(6) requires the claimant to serve the reply on the respondent no more than two business days after it is given to the adjudicator.

Clause 15 provides for replacement of section 25 (Adjudication procedures).

Proposed replaced section 25 sets out the procedure to be followed by an adjudicator when deciding an adjudication application and applications for extension of time. The time requirements for deciding adjudication applications are to be set out in proposed new section 25A and 25B.

Proposed section 25(3)(a) provides that the adjudicator must decide whether he or she has jurisdiction to adjudicate the application.

Proposed section 25(6) provides that where the adjudicator determines the payment claim has been incorrectly identified as a complex payment claim, the adjudicator must continue to decide the application as if it related to a complex payment claim.

Proposed section 25(7) provides that where the adjudicator determines the payment claim has been incorrectly identified as a standard payment claim, the adjudication application is taken to be withdrawn.

Proposed new section 25A (Time requirements for adjudication proceedings) provides for differing times for the adjudicator to decide an adjudication application depending on whether the claim is a standard claim or a complex claim.

Proposed section 25A(1) provides for an adjudicator to decide an adjudication application in the period following the adjudication response, or for a complex payment claim, after the period in which the claimant may give a reply under section 24B.

Proposed section 25A(2) provides for an adjudicator to decide an adjudication based on a standard payment claim within 10 business days after the date on which the adjudicator received or should have received the adjudication response.

Proposed section 25A(3) provides for an adjudicator to decide an adjudication based on a complex payment claim within 15 business days after the date on which the adjudicator received or should have received the adjudication response or where there is also a reply received from the claimant, within 15 business days of receiving the reply.

Proposed section 25A(4) and (5) provide for the claimant and respondent to agree in writing for the adjudicator to have further time to decide the adjudication application and that this may be agreed before or after expiry of the time for the adjudicator to decide the adjudication application.

Proposed new section 25B (Extension of time requirements by adjudicator) provides that, for complex claims, where the claimant and respondent attempted but failed to agree on an extension of time for the adjudicator to make the adjudication decision, the adjudicator may decide the adjudication application within 5 business days after the time when the adjudicator would have had to decide the application under section 25A(3).

Clause 16 amends section 30 (Consequences of not paying claimant adjudicated amount) to replace references to the authorised nominating authority with references to the registrar.

Clause 17 amends section 32 (Claimant may make new application in certain circumstances) to update references to proposed new sections 25A and 25B.

Clause 18 amends section 33 (Claimant may suspend work) and updates a reference to apply to section 19(2).

Clause 19 replaces section 34 (Authorised nominating authority's fees) with a new section 34 (Incorrectly identified standard and complex payment claims).

New section 34(2) provides that if, under section 17(2)(d), a claimant incorrectly identifies a complex payment claim as a standard payment claim, the payment claim is taken to be a standard payment claim unless and until an adjudicator decides the payment claim has been incorrectly identified under division 2.

New section 34(4) provides that if, under section 17(2)(d), a claimant incorrectly identifies a standard payment claim as a complex payment claim, the payment claim is taken to be a complex payment claim for the purpose of Part 3.

Clause 20 amends section 35 (Adjudicator's fees) and provides for the circumstances in which an adjudicator's decision is void and unenforceable but the adjudicator acted in good faith and makes provision for where an adjudicator refuses to communicate their decision because their fees and expenses are unpaid.

Clause 21 inserts proposed new sections 35A and 35B.

New section 35A (Matters to be considered in deciding fees) provides for matter to be considered by an adjudicator when determining the proportion of the adjudicator's fees and expenses to be paid by the claimant and the respondent.

New section 35B (Withdrawing from adjudication) provides for the withdrawal from an adjudication application by a claimant and by a respondent (by paying the claimed amount).

Clause 22 amends section 38 (Registrar's functions and powers) and provides for alterations to the registrar's functions and powers.

Clause 23 omits section 39 (Delegation by registrar).

Clause 24 omits section 40 (Acting Registrar).

Clause 25 amends section 41 (Annual report on operation of Act and registry) and enables the report on operation on the Act and registry to be included in the Commission's annual report.

Clause 26 omits Part 4, division 2 (Registration of authorised nominating authorities).

Clause 27 amends section 68 (Form of certificate of registration) by in section 68(a) replacing "registrant's" with "adjudicator's".

Clause 28 amends the Part 4, division 4 heading to remove the reference to authorised nominating authorities.

Clause 29 amends section 69 (Definitions for div 4) and provides for altered definitions of "registrant" and "registration".

Clause 30 amends the heading to Part 4, division 5 (Amendment of registrations of authorised nominating authorities and adjudicators) to remove the reference to authorised nominating authorities.

Clause 31 amends section 73 (Definitions for div 5) and provides for altered definitions of "registrant" and "registration".

Clause 32 amends the heading to Part 4, division 6 (Suspension or cancellation of registrations of authorised nominating authorities and adjudicators) to remove the reference to authorised nominating authorities.

Clause 33 amends section 76 (Definitions for div 6) and provides for altered definitions of "registrant" and "registration".

Clause 34 amends section 84 (Effect of suspension or cancellation of registration of authorised nominating authority or adjudicator) and replaces references to an authorised nominating authority with references to the registrar.

Clause 35 amends the heading to Part 4, division 7 (Other provisions about registrations of authorised nominating authorities and adjudicators) to remove the reference to authorised nominating authorities.

Clause 36 amends section 86 (Definitions for div 7) and provides for altered definitions of “registrant” and “registration”.

Clause 37 amends section 100 (Effect of pt 3 on civil proceedings) and makes altered provision for the effect of Part 3 on civil proceedings. Section 100(4) will now provide that where a court finds that only part of an adjudicator’s decision is affected by jurisdictional error, it must identify the part affected by the error and allow the part of the adjudication decision not affected by the error to remain binding on the parties to the proceedings.

Clause 38 omits section 101 (Adjudicator must give copy of decision to authorised nominating authority).

Clause 39 omits section 102 (Authorised nominating authority must give information to registrar) and replaces it with a new section 102 (Adjudicator must give information to registrar) which makes provision for the information to be given by an adjudicator to the registrar.

Clause 40 amends and renumbers section 105 (Evidentiary aids).

Clause 41 amends section 107 (Protection from liability for adjudicators and authorised nominating authorities) and replaces references to an authorised nominating authority with references to the registrar.

Clause 42 amends the heading to Part 7 (Transitional).

Clause 43 inserts a new division 1 in Part 7 “Transitional provision for Act No. 6 of 2004”.

Clause 44 inserts a new division 2 “Transitional provisions for Building and Construction Industry Payments Amendment Act 2014” and new sections 112 to 114 providing transitional provisions consequent upon the amendment Act.

Clause 45 amends Schedule 2 (Dictionary) to the Act, consequential upon the amendment Act.