

Statutory Review of the *Construction Contracts Act 2004* (WA)

To
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Introduction

The Law Society of Western Australia welcomes the review of the *Construction Contracts Act 2004* (the Act), which came into operation on 1 January 2005.

Section 56(1) of the Act requires the Minister for Commerce to review the operation and effectiveness of the Act as soon as practicable after the fifth anniversary of its commencement.

On 10 June 2014 the Building Commissioner, Mr Peter Gow announced that Professor Philip Evans of Curtin University had been appointed to review the Act and invited stakeholders to make submissions.

Summary of the Society's submission:

- Fundamentally, the Act is working well. The Act provides an effective mechanism for the pursuit of claims for payment under construction contracts.
- It should be borne in mind that the purpose of the Act is not to provide a mechanism for final resolution of all disputes which may arise in the construction industry. Complex disputes are sidelined. The Act is not intended to provide a final resolution of disputes which may arise under construction contracts. The aim of the Act is to provide a rough and ready mechanism for keeping the cash flowing in construction contracts.
- Some amendments to the Act should be made, but the number and extent of changes should be kept as few and as minor as possible, so that the operation of the Act is not impeded by complex and incomprehensible legislation.
- Active promotion of the Act by the Building Commissioner would increase awareness of the Act amongst small contractors and subcontractors and increase the effectiveness of the Act overall.

A number of specific questions were raised in the Discussion Paper. Accordingly, the Society responds to each question.

Question 1 - Time limits in which an application can be made

- a) Should Section 26 of the Act be amended to extend the time limit in which the adjudication must be brought, or a payment claim can be made, from 28 days to 90 days from which a dispute arises?

- 1 The 28 day time limit for making an application should not be altered.
- 2 The adjudication system provides for the making of determinations which have significant legal consequences. In general, the determinations involve payment by principals to contractors. Determinations are enforceable as judgments of the Court. A failure to pay justifies suspension of work under s 42 of the Act. The Courts will enforce determinations in circumstances where there is a real risk that the principal will be unable to recover monies paid pursuant to a determination because of the financial situation of the contractor (*RJ Neller Building Pty Ltd v Ainsworth* [2009] QdR 390). Determinations under the Act are made in circumstances where the principal is not able to fully ventilate such defences as it may have to the payment claim, determinations are made on the papers, with no opportunity for cross examination. There is no opportunity for an appeal on the merits of the determination.
- 3 The Society does not quibble with this approach. It is entirely appropriate. However, this approach it is only justified on the basis on the need to maintain the flow of cash in the contracting chain. If the time limit for making an application by a claimant is extended to 90 days, then the "cash flow" justification for the adjudication system ceases to be relevant. If a contractor can wait 90 to make a claim, then cash flow is clearly not a problem for that contractor. If cash flow is not a problem, there is no good reason why should a principal lose its right to have its payment dispute with the contractor determined in the usual way by the Court or an arbitrator, that is to say after a full hearing, with the opportunity to cross examine adverse witnesses.
- 4 Further, the 28 day time limit for making an application is not the only time limit applicable to the adjudication process. The respondent has only 14 days within which to respond and the adjudicator only 14 days within which to make a determination. If there is to be any extension of the time for the making of an application, then there is no reason why the time limit for providing a response and for making a determination should not be extended correspondingly. The process would cease to be a rapid process. That would undermine its justification.
- 5 An additional reason for not extending time limits is that doing so is likely to increase the cost and expense of proceedings. It is a matter of common experience that work expands to fill the time available to perform it. If the time limit for making an application is increased to 90 days, applications are likely to be more extensive, involve items expert reports. This is inconsistent with the ethos of the legislation. If the adjudication process is going to take 146 days, then there would be a temptation to have an oral hearing, at which parties would need to be represented. The process will become a mini arbitration, requiring legal skills, rather than an informal technical process. Again this would undermine the justification for the Act.
- 6 A lengthy period for an applicant to prepare its case may disadvantage a respondent. It should be remembered, in this context, that a principal may bring an application for adjudication against a contractor. A contractor may be disadvantaged by a long period of time to make an application in such circumstances.
- 7 The time limit for making an application should remain unchanged.

Question 2 - Timelines for Responses

- a) Does the 14 day time limit, in which the respondent must prepare a written response to the application and serve it on the applicant and the adjudicator, allow sufficient time for this to be undertaken adequately?
- b) If not, what is an appropriate balance to facilitate rapid adjudication?
- c) In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity and/or monetary threshold?

- 8 Provided the time limit for making an application remains unchanged, the time limit for providing the response should not be altered. The time limit for a response is a short one. It can be difficult for a respondent to gather together its response. However, this difficulty can be exaggerated. A respondent will already have seen the payment claim, before the application is made and ought to have formed a reasonable opinion about it.
- 9 There is some basis for the time limit for a response to be increased where a claim is particularly complex. It is, however, hard to determine how complex a matter is in the abstract. The amount in dispute is not a reliable guide. Small claims can be factually complex. Large claims can be very simple. The objects of the Act are not, in our opinion, furthered by a complicated legislative scheme. Varying time limits are likely to add to arid legalistic arguments about time limits.
- 10 The Act presently deals with claims which are too complex by allowing the adjudicator to dismiss the claim. This adequately deals with the issue of complexity. This approach should be retained. A single set of time limits should apply to all disputes. A tiered approach is inappropriate.
- 11 If, contrary to the opinion expressed above, the time limit for making an application is extended to 90 days, respondents should have at least 28 days to respond.

Question 3 - Timelines for Determinations

- a) Does the 14 day time limit allow sufficient time, in which the appointed adjudicator has to make a determination?
- b) If not, what is the appropriate balance to facilitate rapid adjudication?
- c) In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity and/or monetary threshold?

- 12 The existing 14 day time limit is appropriate for making determinations. The adjudication scheme is justified by the need to maintain cash flow in the contracting chain. This purpose is not served by extending the time limits.
- 13 For the reasons given in respect of the provision of responses, a tiered approach is not appropriate.

Question 4 - Timelines for Extensions

An Adjudicator can, pursuant to Section 32, with the consent of the parties, extend the time prescribed by Section 31(2) for making a determination. Many Adjudicators are finding that with the larger and more complex adjudications, parties are not consenting to any requested extension.

- a) If the time to make a determination remains at 14 days, should the Adjudicator be able to grant an additional 7 days extension of time, without the consent of the parties?
- b) Should the Adjudicator be able to then seek an additional 7 days extension of time with the permission of the parties?

- 14 It has not been the experience of members of the Society that parties are unwilling to extend time limits for adjudications. It should be noted that the parties are entitled, other things being equal, to a determination within the time limits fixed by the Act. Prima facie, they do not act unreasonably when they insist that an adjudicator completes the matter within the time scale specified in the Act.
- 15 It is not appropriate for adjudicators to be able to extend the time limit for delivery of a determination without the consent of the parties. If the application is too complex to be dealt with in the time available, then the application falls within s 31(2)(a)(iv) and should be dismissed. The parties would then be free to pursue their rights in the usual way. It must be borne in mind that adjudication is not intended as a mechanism for resolving all disputes which might arise between principal and contractor. It is designed to resolve simple disputes quickly and keep cash flowing. If adjudicators are permitted to grant an extension without the consent of the parties, this will have the effect that the real deadline for making a determination will become 21 days. This should be resisted, because it is inconsistent with the fundamental idea that decisions should be made promptly.

Question 5 - Underutilisation of the Act's Provisions for Payment Claims

- a) Is the *Construction Contracts Act 2004* a suitable vehicle for resolving some payment claims?
- b) Is there any way the Act could be modified to better facilitate the rapid adjudication of these claims?

- 16 The Society considers that the Act is an appropriate mechanism for the resolution of small claims.
- 17 The main difficulty that arises with small payment claims is that they are prepared without any real knowledge of the Act. Frequently the claims are made late, they are not in accordance with the requirements of the Act and do not have regard to the implied terms of the contract. These difficulties would arise less often if there were greater grass roots knowledge of the existence and operation of the Act. It appears that, frequently, small contractors and subcontractors find out about the Act after the horse has bolted.
- 18 These difficulties should be addressed by an active education campaign by the Registrar and industry associations, rather than by amending the legislation. The active promotion of the Act should be part of broader training in business basics for small contractors and subcontractors.

Question 6 - Alternative Dispute Resolution Mechanisms for Small Claims

- a) Should the *Building Service (Complaint Resolution and Administration) Act 2011* be amended to extend its provisions to allow the Building Commission to manage an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under \$25,000 in value?
- b) If yes, should the adjudication service be fee-for-service, with administration costs partly funded by an increase in the Building Services Levy? Or, are there alternative means of funding this service?
- c) If not, what other alternative means should be explored by Government to address the issue of small claims?

- 19 The Society supports amendments which would allow the Building Commission to manage an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction claims under \$25,000, funded by an increase in the building services levy.

Question 7 - Regulation of Adjudicators

- a) Are the registration requirements correct?
- b) Should adjudicators be registered for a finite time?
- c) Should Adjudicators complete a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite?
- d) Is there a need for continuing professional development (CDP)?
- e) The average Adjudicator's fees are about \$265 per hour. The fees range from \$100 to \$400 per hour. Should adjudicator fees be prescribed?
- f) How should adjudicator performance be audited?

- 20 The Society considers that the present system for the regulation of adjudicators is satisfactory. A post-graduate qualification is not necessary, although knowledge of basic contract law principles is appropriate.
- 21 Further specific CPD requirements would not be helpful, because of the multiplicity of CPD requirements that are already imposed.
- 22 Further regulation of fees is not appropriate. It is not clear that an adjudicator's hourly rates are directly related to the overall expense of an adjudication. More experienced adjudicators are likely to have higher hourly rates, but at the same time, can deal with applications more quickly.

Question 8 - Exclusion of Damages

- a) Do you agree that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted?

- 23 Exclusion of claims for liquidated damages from the adjudication process is *not* warranted. As noted in the questions paper, there is no evidence that exclusion of liquidated damages is appropriate. If a matter involving liquidated damages is too complex to be determined under the Act, the application should be dismissed under s 31(2)(a)(iv) of the Act.

Question 9 - Inclusion of Domestic Building Contracts

- a) Should matters related to the *Home Building Contracts Act 1991* be included in the Act?

24 There is no reason why "domestic" building work should be excluded from the scope of the Act. There is no reason in principle why:

- builders carrying out domestic building work should not pay their subcontractors in a timely fashion; or
- domestic owners should not pay builders promptly.

The Act should apply in such circumstances.

Question 10 - Exclusion of Certain Mining Activities

- a) Should the Act apply to the resources sector?

25 It is arguable that the Act should apply to actual mining and exploration work. However, there is no real justification for the exclusion in s 4(3) of the Act of the construction of plant for the purposes of extracting or processing oil, natural gas or other mineral bearing substances. Construction work of this nature is not fundamentally different from construction work in other contexts. The Act should apply to this work as well.

Question 11 - Construction of Plant for the Purposes of Extracting or Processing

- a) Should the Act apply to the construction of plant for the purposes of extracting or processing?

26 See above, paragraph 25.

Question 12 - Exclusion of Artworks

- a) Should the Act apply to artworks?

27 There is no reason why artistic works should be excluded from the Act, if they otherwise fall within the language of the Act. Large scale public works are basically similar to construction work and should be covered by the Act.

Question 13 - National Uniformity and 'Harmonisation'

- a) In terms of 'harmonisation', should Western Australia consider the Society of Construction Law Australia's proposal for a national approach to security of payment legislation?
- b) In terms of 'harmonisation' should Western Australia consider adopting the *Construction Contracts (Security of Payments) Act 2004* (NT)?
- c) Should Western Australia maintain its version of the current 'West Coast model', with minor amendments?

28 The Society submits that it would be generally advantageous for there to be a single Australia wide system for the adjudication of payment disputes. However:

- no moves towards standardisation should be made, unless it is clear that the standard legislation is superior to the Act. That cannot be said of the legislation presently in force in the Eastern States;

- the Society of Construction Law has proposed a form of legislation for adoption by the Commonwealth Parliament. The legislation is based on the draft legislation proposed by the Cole Royal Commission. There is no sufficient reason to adopt that legislation. Although it is considerably better than the East Coast model, it is not superior to the West Coast model. There is no reason for the WA Parliament to adopt it; and
- for a number of years, there have been there have recently been ad hoc changes in the Eastern States which have the effect of making the legislation there depart from each other.

Additional Issues

In addition to the questions in the Discussion Paper, the Society recommends that the following changes should be made to the Act:

Calculation of time limits

- 29 It would be desirable for time limits to be expressed in terms of "business days", rather than calendar days. The time limit for serving the response should be for 10 business days, rather than 14 calendar days. This is important because, at Easter and over the Festive Season respondents and adjudicators can be significantly prejudiced because of the number of holidays in a 14 calendar day period. This change should not result in any change in the standard time limits.

Withdrawal of applications


- 30 Parties frequently compromise payment disputes and want to "withdraw" the application. However, the Act does not contain a process by which an application for adjudication can be withdrawn. An adjudicator is not entitled to payment under s 44 of the Act unless the application is dealt with by determination or dismissal under s 31(2). This creates a tension, which should be resolved by the introduction of a mechanism for applications to be withdrawn.

Payment dispute

- 31 There was for some time debate about the operation of s 6(a) and, in particular, whether a payment dispute arises as soon as a claim is rejected or disputed or whether the payment dispute does not arise until the payment claim would have been due. That issue has now largely been resolved by decisions of the State Administrative Tribunal, so that a dispute arises as soon as a claim is rejected or disputed. However, section 6(a) should be amended to put the matter beyond doubt.

Application for adjudication

- 32 At present, s 26(2) of the Act and the Regulations have been interpreted so that a failure to include minor aspects of the contact details of a prescribed appointor or a respondent could result in an application being dismissed (see *WQube Port of Dampier v Loots of Kahlia Nominees* [2014] WASC 331 at [97] to [100]). This is not satisfactory. It should be sufficient if there has been substantial compliance with the requirements of the Regulations.


Konrad de Kerloy
President