



# Changes to the Construction Contracts Act

From 15 December 2016, important changes to the *Construction Contracts Act 2004* (the Act) come into effect. These changes aim to improve the operation of, and access to, the rapid adjudication scheme the Act affords for resolving payment disputes under construction contracts.

While the changes are principally designed to assist subcontractors, all parties to a construction contract will be affected. Therefore, it is important that all participants within the building and construction industry are familiar with, and understand, the important changes. Broadly, the changes include:

- Extending the time limit for making an application for adjudication of a payment dispute from 28 calendar days to 90 business days.
- A change to the definition of payment claim in the Act to allow for the adjudication of previously rejected or disputed claims.
- The 14 calendar day time frames for the preparation of a response and the adjudication determination to be expressed as 10 business days.
- Excluding the period between 25 December and 7 January (inclusive) from the counting of days.
- Refining the 'mining exclusion' in section 4(3) (c) of the Act.
- Providing a process for the automatic registration of an adjudication determination as an order of the court.
- Giving adjudicators the power to allow an applicant to withdraw their application, or for the adjudicator to make a consent determination where the parties have reached a settlement.
- Providing that applications for adjudication will be considered valid where there has been 'substantial compliance' with the Regulations.
- Clarifying when a 'payment dispute' arises for the purposes of the Act.

A further change has also been made to section 10 of the Act to provide that the maximum payment terms in construction contracts shall be no more than 42 calendar days. This change commences operation from 3 April 2017, and applies to all contracts executed after this date. However, it is important for industry participants to begin reviewing their contracts now in anticipation of the commencement.

## Time limits for adjudication applications, responses and determinations

All time limits in the Act, apart from section 10 and the implied provisions in Schedule 1, will be measured in 'business days.' Business day is defined to exclude weekends, public holidays and a day between 25 December and 7 January (inclusive), meaning that these days are excluded for the purposes of calculating the applicable time limit.

The time limit for preparing and serving an application for adjudication under section 26(1) of the Act will be extended to 90 business days from when the payment dispute arose under the construction contract. Furthermore, section 58 of the Act provides that where an

application would otherwise have been out of time (that is, outside the 28 day time limit), it may be resurrected provided an application was not already made, and on or after

15 December 2016, the application can be made within 90 business days of the payment dispute. Effectively, this will allow applicants to 'look back' to the period from 11 August 2016 to 15 December 2016, and if a payment dispute arose under a construction contract during this period, an application for adjudication will still be considered valid even though it would otherwise have been time-barred.

Time limits for preparing responses and determinations remain unchanged, except they are now expressed as 10 business days respectively.

## **Payment claims – recycling now permitted**

One of the most significant changes to the Act is the new definition of 'payment claim' in section 3 to include "a payment claim that includes matters covered by a previous payment claim." This will allow the previously prohibited 'recycling' of payment claims.

Where a payment claim made under a construction contract has previously been disputed or not paid, and a claim for the whole or part of the same amount or obligation is again made under the contract, if the claim is rejected wholly or partly, or not paid by the time payment was due, then a new 'payment dispute' for the purposes of the Act will arise. This means that the time limit in section 26(1) of the Act (that is, 90 business days) for preparing and serving an application for adjudication will commence from the latest payment dispute.

This change provides greater flexibility in adjudicating payment disputes, but more importantly, aligns the Act closely with the payment process under virtually all standard form construction contracts, whereby progress claims made at one stage or interval can include amounts missed or not certified as owing at a prior stage or interval.

However, an exclusion has been inserted to provide that a 'payment dispute' does not arise where the "payment claim includes matters previously adjudicated upon." This prevents applicants seeking adjudication where the payment claim made under the construction contract includes amounts or obligations that were the subject of a previous payment dispute that was dismissed or determined by an adjudicator.

## **Excluded 'construction work'**

Two changes have been made to section 4(3) of the Act, which excludes certain types of work from the definition of construction work.

The first change, is the narrowing of the scope of the mining exclusion in section 4(3)(c) of the Act. Rather than excluding "constructing any plant for the purposes of...", section 4(3)(c) will be limited to only the "fabricating and assembling of items of plant used for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing substance", meaning the Act will now cover contracts for civil works in constructing an oil/gas processing or mining plant.

The second change, is the removal of the exclusion in section 4(3)(d) of constructing wholly artistic works. Contracts for the on-site construction, erection, installation etc. of sculptures, installation and murals will now fall within the scope of the Act.

## **Withdrawing applications and settlements**

The Act will now provide an effective mechanism where an applicant wishes to withdraw or when the parties have reached a negotiated settlement.

Section 31(2)(a)(ia) of the Act will require the adjudicator to dismiss an application for adjudication without making a determination of the merits if the applicant gives notice that they wish to withdraw the application.

Section 31(2A) of the Act now allows the adjudicator to also make a consent determination (which in turn can be registered as a judgement of the court, if not paid)

Where the adjudicator has dismissed an application under section 31(2)(a)(ia) or made a consent determination under section 31(2A), they are entitled, under section 44 of the Act, to claim any costs incurred.

## **Substantial compliance with the Regulations**

Where the application for adjudication substantially complies with the requirements of regulation 5 of the Construction Contracts Regulations 2004, the adjudicator will now have the jurisdiction to continue determining the payment dispute.

## **Enforcement of determinations**

The previous requirement in section 43 of the Act to obtain leave of the court to enforce a determination as a judgement will be removed.

Instead a party receiving an adjudication determination in its favour can simply file a copy of the determination certified by the Building Commission and an affidavit that the amount has not been paid with the appropriate court. Once filed, the determination will be taken to be an order of the court and may be enforced accordingly. Any interest owed under the determination will continue to accrue up to the date of filing with the appropriate court.

The appropriate court for filing continues to depend upon the total dollar amount owing under the determination. Those determinations for:

- \$75,000 or less need to be filed with the Magistrates Court;
- \$750,000 or less need to be filed with the District Court; and
- amounts greater than \$750,000 need to be filed with the Supreme Court.

## **Simultaneous adjudications**

Adjudicators may now, without the consent of the parties, adjudicate simultaneously other payment disputes, provided they are satisfied that in doing so it will not adversely affect their ability to determine the dispute as fairly, quickly informally and inexpensively as possible.

## **Reduction in the maximum payment terms in construction contracts**

From 3 April 2017 changes to the maximum payment terms permitted in construction contracts will also commence.

Section 10 of the Act will provide that “a provision in a construction contract that purports to require payment to be made more than 42 days after the payment is claimed is to be read as being amended to require the payment to be made within 42 days after it is claimed.”

The term “days” in section 10 is to be interpreted as calander days, not business days.

Where a construction contract provides for a payment term greater than 42 days then a payment dispute, for the purposes of section 6 of the Act, arises after the 42nd day from when payment is claimed, but not paid. An application for adjudication can then be lodged under section 26(1) of the Act.

Further information about this change will be provided in early 2017, but it is important that industry participants review, and where necessary, alter their standard form contracts in anticipation of the change to section 10 of the Act.

### **Disclaimer**

The information contained in this bulletin is provided as general information only and should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations you should obtain independent legal advice.

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