

Security for payment regime coming to ACT

The *Building and Construction Industry (Security of Payment) Bill* (the 'Bill') was introduced into the ACT Legislative Assembly on 15 October 2009. If passed, the Bill will implement a security for payment regime similar to those that are currently in force in New South Wales, Victoria, Queensland, Western Australia and the Northern Territory and have been proposed in South Australia and Tasmania.

The Bill is designed to help reduce delays in payments in the building and construction industry by providing a faster and cheaper mechanism to resolve disputes and recover debts.

Application

The regime would apply to construction contracts (whether written or oral) where one party undertakes to provide 'construction work' in the ACT or the 'supply of related goods and services' to another party in relation to construction work carried out in the ACT.

'Construction work' is broadly defined and would include such things as: alteration, repair, restoration, maintenance, demolition, roadworks and other infrastructure projects, installation of fittings, painting and decorating, amongst other construction works.

The 'supply of related goods' would include materials and components that form part of the building and plant or materials for use in connection with carrying out the work. The 'supply of related services' includes the provision of labour to carry out construction work, as well as architectural, surveying, engineering, decorating, and landscaping services.

The proposed Act would not apply to domestic building work where a resident owner is a party to the contract.

Procedure

The Bill, upon being passed, would create a statutory right to demand progress payments even where a construction contract does not contain such a right. It also prescribes a date for payment if a date is not already set by the construction contract.

A general guide to the procedure is provided overleaf. The first step involves a claimant submitting a 'payment claim' to a principal for a progress payment. The Bill also prescribes what detail must be stated in a payment claim including a statement that it is made under the Act.

The principal may reply by way of a 'payment schedule' which states the amount that is proposed to be paid and any reasons for withholding any amount. If the principal fails to serve a payment schedule within 10 business days of receiving a payment claim (or sooner if required by the construction contract), then the principal is taken to be liable for the entire payment claim. The claimant may also give notice of its intention to suspend any further work or supply.

If the principal proposes to pay an amount that is less than the payment claim or the principal fails to pay all or part of the amount in the payment schedule, then the claimant may seek an adjudication of the dispute.

There are strict time limits provided for making an application for adjudication. The time is limited to either 10 or 20 days depending on the circumstances of the dispute.

The principal may lodge a response to an application for adjudication, but that response is limited to the reasons for withholding payment that were stated in the payment schedule. This response is required before the latter of 7 business days from receiving the application or 5 business days from receiving notice of the adjudicator's acceptance of the application (in NSW the time frame is shorter, being 5 business days and 2 business days respectively).

A determination by the adjudicator must be made within 10 days of the adjudicator receiving a response or the time for lodging a response (whichever is the earliest). If the respondent is not entitled to give a response, 10 business days after the respondent receives a copy of the application.

Payment must be made within 5 days of any determination, otherwise the claimant can suspend work and enforce the amount as a judgment debt.

The adjudicator's costs are shared between the parties equally, unless the adjudicator decides otherwise.

Comments

There are strict and very short timeframes. The consequences for missing a deadline are severe, including admissions of liability.

Parties cannot contract out of the procedures. 'Pay when paid' provisions have no effect.

The Bill is not intended to extinguish a party's right to commence court proceedings in the usual way in order to obtain a final resolution of a payment dispute.

The procedures will not come into force unless and until the Bill is passed and may be subject to changes.

If the Bill is passed, Bradley Allen can assist you by reviewing and advising you on your business practices, provide staff training and draft compliant precedents. We can also advise you on any specific matters.

Bradley Allen can act on your behalf in any commercial dispute. We aim to provide advice that is legally accurate and commercially sensible.

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Disclaimer: Intended as a general guide only. Certain time limits and other information have been omitted. The regime is not currently in force and may be subject to changes. No responsibility is accepted for reliance on any material contained in this newsletter.

Legal advice should always be sought on any specific matters or questions.

