



## ADJUDICATION FORUM

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Attention Ms Katie Harbon

### **Adjudication Forum response to the exposure draft of the Building and Construction Industry Security of Payment Amendment Bill 2018**

Following is the Adjudication Forum's (the **Forum**) written submission in response to the draft Bill related to the *Building and Construction Industry Security of Payment Act* (the **Act**).

Where we have not responded to a numbered section, the Forum agrees and supports the provision in the draft Bill (the **Bill**).

#### **[3] Section 8 Rights to progress payments**

Claimants must be provided an ongoing entitlement to submit payment claims commencing after they have carried out the work and continuing for 12 months. This maintains the entitlement provided by s 13 (4) of the Act.

#### **[4] Section 11 Due date for payment and**

#### **[5] Section 11 (1B) (a)**

The Forum suggests that Recommendation 19 as provided in John Murray's 'Review of Security of Payment Laws dated December 2017 (the **Murray Review**) be adopted and the due date for payment be:

- a) *the date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or*
- b) *if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made.”*

This is a simple and easy to understand approach, with the 10 business days assisting smaller contractors to expedite their entitlements to lodge notices under s 17(2) of the Act and suspend work under s 27 of the Act.

**[8] Section 13 (2) (c)**

The requirement for payment claims to state that they are made under the Act must be reinstated.

There is too much confusion without this requirement which leads to many payment issues including multiple payment claims for the one ‘reference date’.

Claimants should have the opportunity to not make a payment claim under the Act.

**[14] Section 17A**

Providing a Claimant with an unfettered right to withdraw an adjudication application should not be adopted. This provision will:

- a) Enable Claimant’s to carry out ‘adjudicator shopping’ if they are not happy with the adjudicator that has accepted the adjudication application.
- b) Enable Claimant’s to review the Respondent’s detailed ‘reasons for withholding payment’ then withdraw the adjudication application and raise alternative arguments in a new adjudication application.
- c) Make the respondent responsible for 50% of the adjudication fees, as there will be no adjudication determination apportioning the fees.

In court proceedings the plaintiff can only discontinue proceedings with the consent of the defendant or the court.

When this occurs, the plaintiff will typically be required to pay the defendant’s costs of the proceedings.

While formalising the Claimant's entitlement to withdraw an adjudication application does have some merit because it does happen in an informal way at present it should only be done under the following conditions:

- a. Any adjudication fees incurred to date must be paid;
- b. The respondent must consent to the withdrawal of the adjudication application;
- c. The Claimant is to be responsible for 100% of the fees, unless there is an agreement otherwise.

**[19] Section 22 Adjudicator's determination**

The proposed amendment does not improve the operation of the Act and does not assist Claimant's to be paid in the manner contemplated by the Act.

There is a risk that recalcitrant Respondents will take advantage of this provision and go out of there way to avoid the Adjudicator's service of the determination.

The status quo should remain whereby the Respondent is required to pay the adjudicated amount five business days after being served a copy of the determination by any means.

**[22] Section 26B Obligation of principal contractor to retain money owed to respondent**

There is an unintended consequence as a result of subsection 26B (3) of the Act which reads in part as follows:

*'(3) The obligation to retain money under this section remains in force only until whichever of the following happens first:*

- (a) the adjudication application for the payment claim is withdrawn,*
- (b) the respondent pays to the claimant the amount claimed to be due under the payment claim,*

- (c) *the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the Contractors Debts Act 1997 in respect of the payment claim,*
- (d) *a period of 20 business days elapses after a copy of the adjudicator's determination of the adjudication application is served on the principal contractor.'*

The section requires that a principal contractor retain money unless one of the circumstances described arise.

However, where an adjudication application is not provided by the adjudicator (due to for example lack of jurisdiction to proceed etc) and the claimant fails to withdraw the adjudication application, the principal contractor is not permitted to pay the withheld money to the respondent causing it significant financial issues.

A possible solution would be to add a new 26B (3)(e) as follows:

- (e) *a period of 10 business days elapses after a copy of the adjudicator's notice to the parties that no determination has been made."*

### [30] **Sections 32A and 32B**

Section 32A (1) (b) allows a court to make an order remitting a matter to the adjudicator for redetermination, in whole or in part, in accordance with any directions of the court.

The Forum notes that the Murray Review did not recommend remittal.

The Forum does not recommend remittal.

If a determination is found to be incorrect in a minor matter which does not affect the validity of the remainder of the determination, that part should be able to be excised.

### **32B Application of Part to a claimant in liquidation**

Care needs to be taken here so that Claimants that are trading under Deeds of Company Arrangement are not excluded from using the Act.

## **Other issues discussed at meeting of 12 September 2018**

### **a) Facilitating electronic transfer of documents**

Consideration should be given to:

- i. Enabling files contained on USB drives served at the time the drive is provided i.e treating them the same as a document.
- ii. Encouraging parties to use contemporary document transfer systems (such as Lock Box)

### **b) Removing the owner occupier (owner builder) exemption**

Owner builders should be treated like 'professional builders' and the subcontractors that work for them availed the protection provided by the Act.

There is no logical reason this should not occur if the Act is to assist subcontractors.

### **c) Requirement copies of supporting statements served on the principal to be served on subcontractors as well**

This proposal should be considered.

If it is implemented 'correctly' with an effective enforcement regime the additional transparency will assist all industry participants.

The Forum thanks you for the opportunity of contributing both at the meeting on 12 September 2018 and with this written submission.

For further information please contact the undersigned.

Yours sincerely

The Adjudication Forum

Robert Sundercombe

President