Philip Davenport
Solicitor

Tel [02] 91 308 908
Mob. 0418 248 086
p.davenport@bigpond.com

6/6 Notts Ave.
Bondi Beach
NSW 2026

3 September 2018

Department of Finance, Services and Innovation
Regulatory Policy Branch
Email: securityofpayment2018@finance.nsw.au

Public consultation draft - *Building and Construction Industry Security of Payment Amendment Bill 2018*

Summary

• Section 8 of the Principal Act should be replaced with:

> 8(1) A person:
> (a) who has undertaken to carry out construction work under a construction contract, or
> (b) who has undertaken to supply related goods or service under a construction contract,
> is entitled to a progress payment.
>
> 8(2) If a construction contract provides a date for serving a claim for a progress payment, then on and from that date the claimant can serve a claim for a progress payment.
>
> 8(3) If in any named month a construction contract does not provide a date for serving a claim for a progress payment then on or from the last day of the named month the claimant can serve a claim for a progress payment.
>
> 8(4) If a construction contract is terminated then on or from the last day of each named month after the date of termination the claimant can serve a claim for a progress payment.

• Only three provisions of the proposed Bill are consistent with the object of the Principal Act. They are the amendment of s 11(1A)(a) to reduce 15 business days to 10 business days [for payment by a principal to a head contractor], the amendment of s 11(1B)(a) to reduce 30 business days to 20 business days [for payment of a subcontractor] and the amendment of section 13(2(c) to reinsert the requirement that a payment must state that it is made under the Act.

• The other proposed amendments will impose unnecessary additional burdens and regulations on the construction industry and will make it more difficult for claimants to recover progress payments. They should not be enacted.

- The proposed Bill fails implement to the most important recommendations of the *Murray Report* and the *Collins Report*, namely, to render void unfair contract terms in contracts of adhesion and to legislate for cascading trusts.

Introduction

These comments are on the public consultation draft bill published on 22 August 2018. I am concerned that many of the amendments now proposed will make it more difficult for claimants to recover progress payments and will impose unnecessary regulatory burdens on the construction industry.

Recommendation 2 of the Murray Report is, "The legislation should be drafted and structured as simply as possible …". The proposed Bill is not drafted and structured as simply as possible.

With over 50 years experience in the construction industry I believe that I am well qualified to make suggestions for improvement of the draft bill. I was engaged by the Government to devise the original scheme that became the *Building and Construction Industry Security of Payment Act 1999* and the 2003 amendments. I have adjudicated many hundreds of adjudication applications and I am the owner of *Expert Adjudication*, an authorised nominating authority under the Act. I am the author of *Adjudication in the Building Industry*, 3rd edn 2010 Federation Press. Following are my comments.

Commencement

1. **Clause 2** [**Commencement**] provides that the Act will commence on a day or days to be appointed by proclamation. The problem is that the Bill does not include savings and transitional provisions such as were included in previous amending Acts. See Schedule 2 of the Principal Act.

2. This will cause problems. For example, on the commencement of the new section 8 will the reference date under an existing construction contract change? On commencement of the amendment to section 11 will the due date for payment under existing construction subcontracts change? Will an adjudicator have to apply the amendments when determining an adjudication application or a payment claim made before the amendments come into existence.

3. These ambiguities need to be resolved in the Bill and not be left to courts to decide at the expense of the construction industry.

Progress payments

4. In 1999 when the Principal Act was first drafted, it was unique. Over time and with the benefit of many judgments on the interpretation of the Act mistakes have been found. One of the most serious is the definition of "reference date".

5. The first three sections of Schedule 1 to the proposed Bill deal with progress payments under all construction contracts. They do not only deal with payment claims under the Act. They will change the date for making a claim for a progress payment under all construction contracts. Is such a drastic change to the interpretation of construction contracts really necessary? The Explanatory note to the proposed Bill does not give a reason for the proposed change.

6. The term "reference date" is still unknown in the construction industry except to those familiar with the Act. The term "date for making a claim for a progress payment" is a well known and understood term. It appears in all construction contracts that provide for progress payments.

7. The term "reference date" has caused enormous problems for claimants and has frequently been used to defeat a claim for a progress payment. It is time to replace the term "reference date" with "date for making a claim for a progress payment". That plain English term will cause no confusion.

8. Construction contracts that provide for progress payments usually provide:

    (a) an entitlement to a progress payment;
    (b) the date that a progress payment can be claimed:
    (c) how the entitlement is to be calculated; and
    (d) the due date for payment.

9. Section 8(1) of the Principal Act provides for (a) [the entitlement to a progress payment] but it states that the entitlement only arises on and from a "reference date". This has lead to confusion and costly litigation concerning the "reference date" and the entitlement [eg *Southern Han Breakfast Point v Lewence Construction* [2016] HCA 52].

10. The entitlement to progress payments should arise by virtue of the fact that the contract is a construction contract. It should be one entitlement not a number of separate entitlements arising on different dates.

11. Section 8(1) of the Principal Act should be amended by omitting the words "On and from each reference date". Section 8(1) should simply provide:

    8(1) A person:
    (a) who has undertaken to carry out construction work under a construction contract, or
    (b) who has undertaken to supply related goods or service under a construction contract,
    is entitled to a progress payment.

12. Section 8(2) is intended to cover (b) the date when the progress claim can be claimed. Sections 9 and 10 prescribe (c) how the entitlement is to be calculated. Section 11 prescribes (d) the due date for payment.

13. The Act could be simplified if the time when a progress payment can be claimed was stated as follows:

> **8(2) If a construction contract provides a date for serving a claim for a progress payment, then on and from that date the claimant can serve a claim for a progress payment.**
>
> **8(3) If in any named month a construction contract does not provide a date for serving a claim for a progress payment then on and from the last day of the named month the claimant can serve a claim for a progress payment.**
>
> **8(4) If a construction contract is terminated then on or from the last day of each named month after the date of termination the claimant can serve a claim for a progress payment**.

14. That is all that section 8 needs provide. It would align the Act with the practice and terminology in the construction industry and in commence generally. Drawing a flowchart of the various options under the proposed s 8 [in the draft Bill] for a reference date will show how complicated the proposed definition is.

15. When section 13(2)(c) is amended to restore that a payment claim under s 13 "must state that it is made under this Act", **section 13(5)** should be amended to provide that:

> **a claimant cannot serve more than one payment claim in respect of each date on and from which the claimant can serve a progress claim for a progress payment**.

16. Alternatively, if to avoid an amendment to s 13(5), which includes the term "reference date", it is considered necessary to include a definition of "reference date" the definition should simply be:

> "reference date" means the date on and from which a claimant is entitled to serve a claim for a progress payment.

17. A claim for a "progress payment" and a "payment claim" are not the same. "Progress payment" and a "payment claim" are defined in s 4 of the Principal Act. The amendment of s 8 recommended above would only affect the provisions of a construction contract with respect to the time for making progress claims if the contract failed to provide an entitlement to make a progress claim in any named month.

18. The amendment of s 8 proposed in the draft Bill would drastically change the provisions of all construction contracts with respect to the time for making progress claims but it would not provide an entitlement to make a claim for a progress payment each month.

19. The Principal Act as it now stands provides in section 8(2)(b) that payment claims can be made on **the last day of each subsequent named month**. The proposal is to introduce a new section 8(2)(b) which provides that subsequent payment claims can only be made on **the last day of each subsequent named month <u>in which the work is carried out or the goods or services are provided</u>.**

20. The addition of the qualification "**in which the work is carried out or the goods or services are provided**" will cause serious problems for claimants. At present a claimant can claim a progress claim in a month in which no work is carried out or goods or services are provided. What possible justification can there be for depriving claimants of that right?

21. Respondents will be delighted if the limitation proposed in section 8(2)(b) is enacted. They will be able to legitimately argue that when no construction work has been carried out [or related goods and services provided] by the claimant in a named month, there is no reference date in that named month.

22. Assume that in June a claimant carries out construction work but a defect exists and in July the claimant rectifies the defect but carries out no other construction work. Is rectification of the defect construction work carried out in July?

23. Sometimes at the date for making a progress claim it is not possible or convenient for a claimant to include in the progress claim the total value of work to that date. For example, the calculation of the value of variations often takes negotiation and considerable time. There is no logical reason why, in a month in which no work is a carried out, the claimant should not be able to claim the unpaid value of work previously carried out. A claimant can do that now. Why impose the proposed limitation on when a claimant can make a claim for a progress payment?

24. In the construction industry and in commerce generally a claimant sends an invoice. If the invoice is not paid the claimant sends another invoice and another invoice until the claim is paid. If Telstra sends an invoice for June and it is unpaid Telstra will send an invoice in July and regularly thereafter even if Telstra has provided no more services to the customer after June or the contract with the customer has been terminated. There is no logical reason for imposing on subcontractors in the construction industry limitations on their right to make payment claims when no such limitations exist in commerce generally.

25. The proposed section 8(2) in the draft Bill would impose limitations [which presently don't exist] on the making of progress claims under all construction contracts even when the claimant is not seeking to recover progress payments under the Act. What possible justification could there be for imposing additional burdens on persons who carry out work under a contraction contract? Why change construction contracts as the proposed Bill proposes for section 8(2)? The Explanatory Note accompanying the proposed Bill provides no reason.

26. The proposed new section 8(3)(b) also includes the words of limitation "in relation to the work carried out or the goods and services supplied".

27. Construction contracts that provide for progress payments usually provide the date each month that a progress claim can be made. They usually provide for one progress claim each month. The proposed amendments will mean that for many construction contracts this will no longer apply.

28. Any express provision in a construction contract for progress payments will be overridden by ss 8(4), 8(5) and 8(6). The effect of those subsections will be that often there will be more than one date in a named month for making a progress payment claim, and sometimes even more dates that.

29. For example, if a construction contract provides for payment of a deposit or an advanced payment, a milestone payment or refund of retention there will be separate reference dates for claiming those payments.

30. As it stands under construction contracts that provide for progress payments, a claimant can usually only make one progress claim each month. That claim usually has to include all moneys then claimed including one-off payments, milestone payments and, where applicable, interest on late payments.

31. Sometimes an entitlement to a one-off payment or a milestone payment and the due date for payment can arise independently of and without the need for a claim for payment. For example, a construction contract may provide that upon issue of the final certificate the principal will pay the contractor the amount of retention Why create a special reference date in that instance?

32. Assume the proposed amendment is made. Assume that a construction contract provides for one progress claim each month. Assume that the contract provides for a one-off or milestone payment on the occurrence of an event, eg satisfactory completion of a test. Assume that that occurs on 10th of a month. As the Principal Act now stands, if the construction contract provides that progress claims can be made on 25th day of each month, that is the date on and from which the claimant can claim the one-off or milestone payment. If the one-off or milestone payment was not made on 10th of the month the claimant may be entitled to interest from 10th of the month.

33. If the Act is amended as proposed, the claimant would have to make two separate progress claims in the one month. If the claimant includes the one-off or milestone payment in a progress claim made on 25th of the month the respondent may raise the argument that the payment claim should have been a separate payment claim made in respect of a separate reference date.

34. There is no definition of a "one-off payment". It is not a term commonly used in the construction industry. Creating a separate reference date for a one-off payment and a different reference date for a milestone payment will create further problems. For example, is a payment for a particular variation a one-off payment or a milestone payment? Is the refund of retention on completion

of a construction contract, a one–off payment or a milestone payment? Is a payment due on practical completion or final completion or issue of a certificate or approval a one-off payment or a milestone payment or another type of progress payment?

35. If a construction contract provides a date for making a progress claim for single or one-off payment or a milestone payment, what justification could there be for changing that date to the date in the proposed s 8(4) or s 8(5)? The amending Act should not change the progress payment provisions of an existing construction contract unless there are sound reasons. No reason has been given.

36. There is no justification for altering construction contracts by changing the time for making progress claims for single or one-off payments and milestone payments and providing a separate time for making progress claims for single or one-off payments and milestone payments.

37. Assume that a contract provides for 3 milestone payments, the first $10,000 on completion of excavation, a second $10,000 on completion of the footings and a third $10,000 on completion of brickwork.

38. Assume that excavation is complete on 1 June but the respondent does not pay $10,000. Assume that the other two milestones are subsequently reached but the respondent has paid the claimant nothing. As the Act stands the claimant could make a payment claim for $30,000 at the end of each named month. There is no logical reason for taking away existing entitlements.

39. With the amendment the claimant would have to make three separate claims for a progress payment and three separate adjudication applications instead of one as is now the case.

40. As the Principal Act now stands, if the claimant makes a payment claim for the first milestone payment and it is not paid, the claimant can include the unpaid amount in a subsequent payment claim [s 13(6) of the Principal Act] provided that a reference date subsequently arises.

41. A consequence of the proposal to create a single reference date for a single or one-off payment and milestone payment will be that for the single or one-off payment or the milestone payment, there will not be a subsequent reference date. Only one payment claim could be made. That payment claim would exhaust the available reference dates for a payment claim for a single or one-off payment or a milestone payment [s 13(5) of the Principal Act].

42. What possible justification could there be for depriving a claimant from existing rights to make a payment claim?

Payment claims after termination of the construction contract

43. The proposed **section 8(6)** is misconceived. Firstly, there is the problem of the definition of "terminated". In chapter 13 our book *Construction Claims* 3rd edn

2013 I and my co-author discuss claims after termination and the problem with what is termination of a contract.

44. Construction contracts can be terminated for many reasons. Courts [eg *Southern Han Breakfast Point v Lewence Construction* [2016] HCA 52] have interpreted the Act so that if a construction contract provides for progress claims a claimant cannot make a progress claim under the construction contract after it is terminated.

45. Unscrupulous principals and head contractors are using termination for convenience clauses to terminate contracts and thereby prevent claimants for recovering progress payments under the Act.

46. The proposed new section 8(6) is presumably intended to prevent this. However it is misconceived. At present, if a construction contract that does not provide dates for making progress claims, the claimant can make a progress claim on or after the last day of each named month, even though the contract has been terminated or is at an end. That should be the position even if a construction contract includes dates for making progress claims.

47. The proposed s 8(6) appears to be based upon the mistaken premise that the entitlement of the claimant will crystalise on the date of termination. This is often not the case.

48. Upon termination of a construction contract, many different situations can arise. Sometimes the construction contract does provide for the entitlement of the parties after termination. Commonly, a termination for convenience clause provides that after completion of the work by other contractors, the entitlement of the claimant will be determined having regard to the contract price, previous progress payments and the cost of having the work completed by other contractors. It may be many months after termination before the claimant's entitlement, if any, arises and can be calculated.

49. Sometimes after the termination of a construction contract [eg for breach by the claimant], a claimant will have no entitlement to any payment from the respondent. Then a right to make a claim for a progress payment will be worthless. The right to make a claim for a progress payment does not mean that the claimant is entitled to a progress payment. The amount, if any, of the progress payment will be determined by s 9 of the Act.

50. Sometimes, termination of the contract may be brought about by the doctrine of frustration. Then, unless the construction contract otherwise provides, the entitlement of the parties will be determined by the *Frustrated Contracts Act 1978* NSW. Is it intended that the Principal Act should override the provisions of the *Frustrated Contracts Act 1978?* This ambiguity needs to be resolved.

Section 13(1) Who can make a payment claim

51. The proposed amendment to **section 13(1)** is misconceived. As section 13(1) stands, only a person who has undertaken to carry out construction work [or to

supply related goods and services] under a construction contract can make a payment claim. If the amendment is made, anyone who claims to be entitled to a progress payment can make a payment claim.

52. As the Principal Act now stands, the procedure for recovering progress payments [Part 3 of the Act] can only be triggered by a person who has undertaken to carry out construction work [or to supply related goods and services] under a construction contract. That should remain the case. It is presently and should continue to be a jurisdictional issue – a condition precedent to the making of a payment claim.

53. What is the point in allowing someone who has not undertaken to carry out construction work [or to supply related goods and services] under a construction contract to make a payment claim under the Act? Is it to provide more work for lawyers and adjudicators?

54. If the respondent fails to serve a payment schedule, the consequence is that under s 14 of the Principal Act the respondent becomes liable to pay the claimed amount and the claimant can recover it as a debt. Section 15 provides that in proceedings by the claimant to recover the debt the respondent is not entitled to raise any defence in relation to matters arising under the construction contract.

55. At present, unless the claimant is a person referred to in section 8(1), ie a person who has undertaken to carry out construction work [or to supply related goods and services] under a construction contract, the payment claim is not valid. Then, even if the respondent fails to provide a payment schedule there can be no legal consequences for the respondent. The statutory debt cannot arise. In proceedings by the claimant to recover the debt it would be a complete defence if the respondent proved that the claimant was not a person who is referred to in section 8(1). This should remain to position.

56. If the proposal to amend s 13(1) goes ahead, what defences would be open to the respondent? For the payment claim to be a valid payment claim, it would not be necessary that the claimant is a person entitled to a progress payment under s 8. Perhaps the respondent could raise as a defence that the claimant could not validly serve the payment claim on the respondent because the respondent is not a person who under the construction contract is or may be liable to make the payment.

57. On the other hand this defence may be barred by s 15(4)(b)(ii) because it is a defence in relation to matters arising under the construction contract.

58. Would an adjudicator have jurisdiction to determine whether a payment claim has been validly served?

59. Why leave these issues to be decided by courts? The legislation should be as simple as possible – a person who has not undertaken to carry out construction work [or provide related goods an services] should not be entitled to make a

payment claim under the Act. That is the existing situation under the Principal Act. It should not be repealed.

60. To amend s 13(1) as proposed there would need to be a very sound reason. No reason at all has been given for the proposed amendment. It should not be made.

More unnecessary regulation of the construction industry

61. The proposal to amend **section 17(3)(b)** by inserting "**in the manner (if any) prescribed by the regulations**" is only creating more unnecessary regulation. What is the reason for the proposed amendment and what "manner" is it proposed to prescribe? The amendment should not be made. I have seen thousands of adjudication applications and I can see no reason for regulating the manner in which they are made. The process of making an adjudication application should be as simple as possible.

Withdrawal of adjudication application

62. It is proposed to amend the Principal Act by inserting **section 17A giving the claimant a right to withdraw an adjudication application** at any time before it is adjudicated. The proposed amendment is unfair to respondents, unreasonable and ambiguous.

63. **The proposed s 17A should not be enacted.** A claimant should only be entitled to discontinue an adjudication application with the consent of the respondent [on such terms as the respondent may agree to] or with the leave of the adjudicator. The Principal Act allows this. I have seen it done many times. No amendment is required.

64. If a claimant commences litigation the claimant needs the consent of the defendant or the approval of the court before the claimant can discontinue the proceedings. Once litigation or adjudication is commenced the respondent has an equal right to have judgment or a determination.

65. In an adjudication the claimant contends that the respondent's reasons for withholding payment are unfounded. Once a claimant commences adjudication a respondent is entitled to have the issues determined. One advantage of this is that the claimant cannot then seek to have the issues decided differently by a subsequent adjudicator. Issue estoppel applies.

66. If, under the proposed new s 17A, a claimant withdraws an adjudication application the respondent is still liable for 50% of the adjudicator's fees and the fees of the authorised nominating authority. The adjudicator cannot apportion them. The respondent could not seek a determination that since the claimant has withdrawn the adjudication application the claimant should pay 100% of the adjudication fees.

67. If the proposed s 17A is enacted then at the very least it should provide that the claimant will, upon withdrawal of the adjudication application, be liable for 100% of the adjudicator's fees and the fees of the authorised nominating authority.

68. Sometimes a respondent spends a lot of time and money on an adjudication response. A claimant should not be entitled to withdraw an adjudication application and thereby render this time and cost wasted.

69. If, on account of the strength of the arguments of the respondent in an adjudication response or for any other reason, a claimant decides that it is not worthwhile to continue the adjudication, the claimant can ask the adjudicator to find in favour of the respondent. That could minimise costs. That can be done, and sometimes is done, without any amendment of the Act.

70. An argument might be made that if the claimant is satisfied with the amount offered or paid by the respondent the claimant should be able to withdraw the adjudication application. Under the Principal Act as it now is, if the parties reach an agreement they can ask the adjudicator to make a determination enshrining their agreement or, with the consent of the adjudicator they can discontinue the adjudication.

71. Withdrawal may be used as a mechanism for adjudicator shopping. If the claimant is not satisfied with the adjudicator to whom the authorised nominating authority has referred an adjudication application, the claimant might immediately withdraw the adjudication application. Could the claimant then ask the authorised nominating authority to refer the adjudication application to another adjudicator? Could the claimant make the same adjudication application to another authorised nominating authority? These ambiguities should not be left to the courts to resolve.

72. If a claimant withdraws an adjudication application is the effect that there is taken to have been no adjudication application? In litigation, proceedings can be discontinued but they can't be withdrawn. The same should apply in adjudication.

73. Mr Murray at p 213 of his report says that he sees no reason why the legislation should not enable a claimant to withdraw its application by issuing a notice of discontinuance. He refers to discontinuance as the means of withdrawing an adjudication application. A summons that is discontinued is not withdrawn. The summons remains on the record. If the plaintiff commences another action on the same claim, the court could strike out the action if satisfied that it is an abuse of process.

74. Similarly, an adjudication application that is discontinued is still an adjudication application. It is not withdrawn. Mr Murray did not consider or seek submissions the implications that would arise from the proposed amendment.

75. An example of the ambiguity is as a follows. Assume that a claimant makes a payment claim for $100,000 and the respondent has not provided a payment schedule within the time prescribed by s 14(4) [usually 10 business days]. The claimant has an option of suing in court for $100,000 or making an adjudication application under s 17. As the Principal Act now stands, if the claimant makes an adjudication application the claimant cannot withdraw it and sue in court for $100,000. If the proposed amendment is passed, will the making of the adjudication application still be a bar to suing in court for $100,000 or will the effect of withdrawing the adjudication application be that the claimant can then sue in court for $100,000?

76. Why create this legal ambiguity when it does not arise as the Principal Act now stands?

Manner (if any) prescribed by regulation

77. It is proposed to amend **s 20** by inserting a requirement that an adjudication response **must be lodged in the manner (if any) prescribed by regulations**. As with the similar proposed amendment to section 17(3)(b) the amendment is only creating more unnecessary regulation. What is the reason for the proposed amendment and what "manner" is it proposed to prescribe? The Explanatory Note to the proposed Bill provides no reason for the proposed amendment. How is the proposed amendment intended to further the object of the Principal Act or the amending Act?

78. If the proposed amendments to s 17(3)(b) and s 20 are made, anyone proposing to lodge an adjudication application or a payment schedule will have the additional task of consulting the regulations to see if any "manner" has been prescribed. This is unnecessary additional work, time and cost. The amendments should not be made.

Response Period

79. **The proposed replacement of s 21(1) would serve no purpose and would introduce ambiguity**. What is it intended to achieve that the existing s 21(1) cannot achieve? We don't need yet another defined term, "response period".

80. What is the "response period" under s 20 when the respondent has no right to make a response? Can a response period be zero days? The only response period in s 20 is 5 business days or 2 business days. It would be hard to argue that there is no response period in s 20 when the respondent fails to lodge a payment schedule.

81. Under s 21(2**)** as it presently stands in the Principal Act, if the respondent is barred by s 20(2A) from lodging an adjudication response the adjudicator does not have to wait till the end of any "response period". There is none. Why should this be changed? I can see no good reason.

82. The term "response period" appears again in the proposal to amend s 21(3)(a). If when a respondent has no right to lodge an adjudication response, an

adjudicator is nevertheless required by the proposed new section to wait till the end of the response period, there will be instances where under s 21(3)(a) the time for the adjudicator to make a determination expires before the end of the response period.

Service by the adjudicator

83. **The proposed insertion of section 22(3)(c) should not be made.** No reason has been provided for the proposed amendment. Usually the adjudicator serves a copy of the determination on the respondent but sometimes the adjudicator will not be able to serve the determination on the respondent or it will be very difficult to do so. In an adjudication the respondent is not required to file an appearance with an address for service. Respondents in the construction industry frequently change address. The adjudicator may have to engage a process server to serve the determination on the respondent. This would add extra cost to adjudication. Also, the adjudicator will not know that he or she will incur this extra cost until after releasing the determination to the claimant.

84. The claimant cannot take proceedings to enforce the determination until a copy is served on the respondent. Consequently, it is in the interests of the claimant to serve a copy on the respondent when the adjudicator is unable to do so. The claimant should not have to wait until the adjudicator serves the determination on the respondent. The claimant should not be reliant upon the adjudicator to serve the determination on the respondent. The adjudicator would also have the additional work of advising the claimant on how and when the determination was served on the respondent.

85. **Section 23** as it stands provides that the "relevant date" is 5 business days after the determination is served on the respondent. It does not say that the adjudicator must serve the determination. The proposed amendment would mean that service of the determination by the claimant on the respondent would be of no effect.

86. A judge or magistrate is not required to serve his or her judgment on the parties as distinct from making it. When a court registrar certifies a judgment for a party, the registrar is not required to serve it on the other party. Why should an adjudicator have this additional burden? The proposed amendment will only further complicate the adjudication process. It should not be made.

Redetermination of an adjudication determination

87. The proposed **s 32A(b)** would give the Supreme Court power to remit "the matter" [whatever that means] to the adjudicator for redetermination in whole or in part.

88. The problem with that is that there is no provision in the Act for a process of redetermination. There is no provision for extending the time for an

adjudicator to make a determination. There is no provision for payment of the adjudicator for making a redetermination. There is no provision for the adjudicator to seek further submissions from the parties. The adjudicator would have to redetermine the adjudicated amount in accordance with the directions of the Court but the Court has no power to override the provisions of the Act and substitute other provisions.

89. The Court has no power to extend the time in which the adjudicator can make the redetermination or to make any order with respect to the fees of the adjudicator. By the time the adjudicator makes the redetermination he or she will be barred by s 29 from claiming any fees. What about the fees that the adjudicator has already received? A determination that is set aside is not a determination under the Act [*Southern Han Breakfast Point v Lewence Construction* [2016] HCA 52].

90. It seems that when an adjudicator has to redetermine an adjudication application the adjudicator would not be entitled to any fee whatsoever. The Court has no power to override a 29(4).

91. When an adjudicator commits a jurisdictional error or denies a party natural justice it is just as often the claimant who suffers as the respondent. All except a handful of the hundreds of cases [I know of only two] that have been brought to court to challenge the validity of the determination have been brought by respondents. The reason is that if determination is set aside, the claimant has no right to have the application redetermined by another adjudicator or the right to make another adjudication application in place of that which has been set aside.

92. What is required is an amendment that would allow a claimant to make a new adjudication application when a determination is set aside. As it is, by the time an adjudication determination is set aside, it may be too late for the claimant to make a fresh payment claim. All available reference dates may have been exhausted.

93. Often a determination is set aside on account of a jurisdictional error or denial of natural justice by the adjudicator. If a judgment is set aside in similar circumstances there is usually no bar to the plaintiff continuing with the original action or commencing another action unless the *Limitation Act 1969* NSW extinguishes the right. The problem with adjudication is that the limitation period for making an adjudication application is very short [s 17(3)].

94. If it is decided to give the Supreme Court power to remit a matter, the Court should not be limited to remitting the matter to the original adjudicator [whose fault it may be that the determination is set aside]. The Court should be empowered to refer the adjudication application to an authorised nominating authority with a direction that it is to be referred to another adjudicator.

Insolvency

95. **Section 32B**. I have reservations about the constitutional validity of this proposed section. Liquidation of corporations should be left to Federal law. Why should a respondent be placed in a better position if the claimant is insolvent? The proposed amendment will encourage respondents to withhold payments so that claimants will become insolvent.

96. Why should a liquidator [of a claimant] who decides to finish a contract or claim refund of retention be deprived of rights that would otherwise exist under Federal law? Why should a liquidator not be able to make a payment claim to recover retention that is or should be held in trust?

97. Respondents are adequately protected by mutual set off provisions under insolvency law and by insolvency law generally. The proposed section will only give rise to more legal disputes. It should not be enacted.

Part 3A Investigation and enforcement powers.

98. These powers don't serve the object of the Act. They are unnecessary further regulation of the construction industry. Business is overburdened with unnecessary regulation. Will these investigation and enforcement powers ever be used? Does the Department have the resources to investigate and prosecute? What will the additional burden be on taxpayers?

99. The proposed section 32D provides that an authorised officer may exercise the functions conferred by Part 3A for the purpose of investigating, monitoring and enforcing compliance with the requirements imposed by or under the Act. The bulk of the requirements imposed by the Act concern making payment claims, payment schedules, adjudication applications, adjudication responses and adjudication determinations and the recovery of payment. These are all part of civil law, not criminal law.

100. Surely the powers should be limited to investigations, monitoring and enforcing penal provisions of the Act. These are very few. Section 12A allows the regulations to create an offence with respect to compliance with trust account requirements. Section 13(7) and (8) creates offences dealing with a supporting statement. Section 26A(5) creates an offence of failure of a person to notify the claimant that the person is not or is no longer a principal contractor. Section 26B(5) makes it an offence to for the claimant to fail to serve on the principal contractor a copy of the adjudicator's determination. Section 36 deals with failure of a person to comply with a notice from an authorised officer. Sections 26D(3) creates an offence of failing to give a notice. Sections 26E(2) and (3) deal with deal with failure to provide information. The proposed new section 28A(4) creates an offence if an authorised nominating authority contravenes a provision of the code of practice.

101. Originally the Principal Act did not include any offences. This was very deliberate. It was because the object of the Act is to ensure that any person who undertakes to carry out construction work or to provide related goods or services under a construction contract is entitled to receive and is

able to recover progress payments, and the way this was to be achieved was by civil proceedings by claimants – not be threat of criminal proceedings against participants in the construction industry.

102. Imposing penalties is an unnecessary additional regulatory burden on business. It does not achieve the object of the Act. Instead of a simple Act, it has become a convoluted regulatory process. The proposed Part 3A is longer than the original Principal Act.

103. How often has the Department ever prosecuted any of the offences? If it has prosecuted, did the Department find that the existing powers were inadequate to prove the commission of the offence? Why does the Department want the proposed additional powers? It is a very serious matter to empower an authorised officer to forcefully enter premises, inspect records and seize documents.

104. To prosecute the offences it is not necessary to have the investigation and enforcement powers under the proposed Part 3A. To prosecute any of the offences it is not necessary to have a search warrant to enter premises and seize records. To prove that a person has not given a notice, a search warrant and inspection of records is not necessary.

105. Does the Department really envisage the need to have a police raid on the premises of a respondent or an authorised nominating authority in order to achieve the object of the Act?

106. There is a risk that the draconian additional powers may be used for illegitimate purposes, for example, to uncover business secrets or information for other purposes or even just to harass a person.

107. The Act was originally designed to give a person who undertakes to carry out construction work or to provide related goods or services under a construction contract the entitlement and power to recover progress payments. It was a self help provision. It was not envisaged that the Government would take over the pursuit of respondents.

108. The Act was originally designed so that if the respondent failed to do something required under the Act, the consequence would be that the claimant would have additional rights, not that the Government would acquire any additional rights to prosecute.

Cascading statutory trusts and unfair contract terms

109. This commentary has only dealt with what is in the draft Bill. A major flaw of the draft Bill is that it fails to deal with Mr Murray's most important recommendations, in particular, on **unfair contract terms** [Chapter 16, Recommendation 84 on p 289] and on **statutory trusts** [Chapter 17, Recommendation 85 on p 314].

110. At p 309 Mr Murray says:

Cascading statutory trust to apply to all levels of contractual payment.

Accordingly, for all the reasons set out above, I have come to the conclusion that a deemed statutory trust should be established by legislation to apply to all parts of the contractual payment claim. Such legislative intervention is long overdue as it has been an issue first promoted in the early 1990s and specifically recommended in only two previous inquiries that specifically considered the issues of financial protection and insolvency in the construction industry in Australia, namely, the WA Law Reform Commission in 1998 and the Collins Inquiry in 2012.

Conclusion

111. If I was asked, "What is in the proposed Bill that could be said to promote the object of the Act?" I could point to only three provisions, namely the amendment of s 11(1A) to reduce 15 business days to 10 business days [for payment by a principal to a head contractor, the amendment of s 11(1B)(a) to reduce 30 business days to 20 business days [for payment of a subcontractor] and the amendment of section 13(2(c) to correct the mistake made in a previous amendment, namely, the removal of the requirement that a payment must state that it is made under the Act.

112. The remainder of the proposed bill does not promote the object of the Act and should not be enacted. The remainder will make it more difficult for claimants to recover progress payments. The ambiguities will increase the opportunity for respondents to raise jurisdictional issues. It will increase the regulatory burden on the construction industry. It will provide more work for lawyers and adjudicators.

Yours sincerely,

Philip Davenport