
Issues Paper – December 2014

Background


The object of the Act is to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

The Act applies only to those construction contracts entered into after 10 December 2011. Whilst the Act generally applies to all construction work, and the provision of related goods and services, it does not apply to domestic building work where the party for whom the work is carried out will reside in the building.

The Act is committed to the Minister for Small Business, Hon. Tom Koutsantonis MP. The Small Business Commissioner (SBC) is responsible for the administration of the Act. In the event of a dispute, the Act provides for referral from the Office of the Small Business Commissioner (OSBC) to the Authorised Nominating Authority or “ANA” of the complainants choice, for adjudication of the dispute.

The OSBC has responsibility for the administration of the Act, this responsibility was transferred to the office by Consumer and Business Services late in 2013.

In that time the OSBC has fielded and assisted contractors and subcontractors with enquiries and advice with procedures to undertake in order to enact the legislation.

A total of $35,098,872.61 was claimed through adjudication mechanisms within the Act in the 2013 – 2014 financial years.

Of the amount above, the total amount awarded to claimants in the same period is $9,912,126.08.

The difference between the claimed amounts and awarded amounts totals $25,186,746.53. This difference reflects factors such as the variation of costs sought versus actual costs incurred in the estimation process, withdrawal of applications, full payment by the respondent before adjudication and settlement by the respondent etc.

The reported figures may not offer a comprehensive representation or otherwise of the adjudication process or the success or otherwise of the adjudication process.
**Purpose of Issues Paper**

Section 36 provides that “The Minister is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing these objectives”.

The review is to be undertaken and a report presented to Parliament within three months of the effective operation date of the legislation.

The purpose of this paper is to comply with this legislated requirement to offer a direction to the discussion about the issues raised relating to the Act, and seeks to elicit public comment on these issues. The issues raised are not intended to be exhaustive, and stakeholders are invited to identify other issues in their submissions.

**Process**

The Minister for Small Business, Hon. Tom Koutsantonis MP is calling for submissions on the issues raised in this paper, and on any other issues relating to the Act that may not have been identified.

The review will be undertaken by Mr Alan Moss – a former Deputy Crown Solicitor, Chief Magistrate, District Court and Youth Court Judge.

Submissions should be sent to:

**The Office of the Small Business Commissioner**

**GPO Box 1264**

**ADELAIDE SA  5001**

Closing date for submissions is Friday 13th February 2015.

Any inquiries should be directed to (08) 8303 2026 or 1800 072 722
1. **Main Issues with the Act**

**Definition of Construction Work**

The Act defines what constitutes construction work under Part 1 (5) as follows:

(1) In this Act—

*construction work* means any of the following work:

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation that forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earth-moving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of fences or scaffolding; and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) other work of a kind prescribed by the regulations for the purposes of this subsection.

Is this current definition of construction work still current?

**Definition of related goods and services**

The Act defines what constitutes construction work under Part 1 (6) as follows:
(1) In this Act—

related goods and services, in relation to construction work, means any of the following goods and services:

(a) goods of the following kind:
   (i) materials and components to form part of any building, structure or work arising from construction work;
   (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind:
   (i) the provision of labour to carry out construction work;
   (ii) architectural, design, surveying or quantity surveying services in relation to construction work;
   (iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;

(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), related goods and services does not include goods or services of a kind prescribed by the regulations for the purposes of this subsection.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

Is this current definition of related goods and services still current?

Application of the Act

A key measure of whether a construction contract is deemed to be covered by the Act is whether the work or related supply of goods or services fits within the definition of construction work (S.5 of the Act).

Is further refinement of this section required to specifically include those contracts that are not afforded the protection of the Act by virtue of “technicalities”, i.e. limitation of time, provision of goods/ services for owner occupier via independent builder etc?
Part 2 - Rights to Progress Payments

Is the Act clear in terms of the definition of the rights to progress payments, calculations of the Amount of the progress payment and Valuation of construction work and related goods and services?

Payment Claims

Part 3 – Procedure for recovering progress payments Division 1 – Payment claims and Payment Schedules 13 – Payment Claims provides that the claimant must provide a payment request to the respondent stating that the payment claim is made under the Act.

This creates some confusion in practice, as many businesses are providing invoices/payment claims with this statement attached at the initial billing stage to their respective contractors. This seems to have been taken up broadly within the industry in South Australia and is a question of law.

Not providing this statement until after the matter becomes a dispute adds further time until the matter may be resolved through the adjudication mechanisms within the Act, as this is a specific trigger. Without this claim statement the Act cannot be utilised by the claimant. This may disadvantage the claimant.

In order to provide certainty to the industry, the Act could be modified so that an invoice or payment claim provided by a claimant would trigger the Acts Adjudication mechanisms, irrespective of whether or not the payment claim provides that it is a claim under the Act. This would result in every claim made being covered by the Act.

Eligibility Criteria for Adjudicators

Part 3 – Procedure for recovering progress payments Division 2 – Adjudication of disputes 18 Eligibility criteria for adjudicators

There have been a number of issues and complaints nationwide regarding eligibility, and transparency of adjudicators and Authorised Nominating Authorities (ANAs). This process falls outside the direct scrutiny of the Office of the Small Business Commissioner.

In order to ensure compliance with the Code of Conduct and to ensure quality of service, the Small Business Commissioner could provide an adjudication panel (similar to the very successful mediation panel that already exists).

Such an initiative would also allow the Commissioner greater oversight of the dispute resolution successes and failures. If the Commissioner is able to identify failures within this system and to identify the root causes for such failures this may allow the process to be improved upon in order to remove some/all of those failures.

Allowing greater oversight and control over the complaint process, the Commissioner would have direct access to all adjudicators within the panel. Should any complaints of perceived bias arise, the Commissioner would be able to appoint another adjudicator. This would ensure that the timeliness of the adjudication process is maintained.
Whilst this process is going ahead the subcontractor may effectively “stop work” on the site with certain protections, it is unclear if these protections remain, if the Respondent appeals the matter to the courts.

Is the existing Code of Conduct for ANAs effective and rigorous? Should it be directly referenced in the legislation and the Code mandated by regulation – including penalties for non-compliance?

Currently ANAs report on the detail or outcome of adjudications and as such the effectiveness of the legislation is based on feedback currently provided.

Should there be a legislated report back requirement?

Are the eligibility requirements in the Code of Conduct sufficient in terms of the “fit and proper” test?

Should there be a requirement to immediately report to the Minister where an ANA is charged with an indictable offence?

The Code of Conduct currently states that “An ANA must not nominate an adjudicator that has been found, by a court in Australia, to have made technical errors in performing adjudications unless the ANA is satisfied that the cause of the error has been resolved.” Does this clause unreasonably restrict the pool of ANA’s /adjudicators available and are there other reasonable remedies?

Is it appropriate for the Small Business Commissioner to have investigative powers in relation to unfair tactics by unscrupulous contractors not paying sub-contractors on multiple occasions?

Consequences of Not Paying Claimant Adjudicated Amount

Part 3 – Procedure for recovering progress payments Division 2 – Adjudication of disputes 24 – Consequences of not paying claimant adjudicated amount

Currently this section of the Act provides that a claimant may request an adjudication certificate from the adjudicator once the adjudication is complete, in order to serve it to the respondent to solicit payment.

The Act also provides mechanisms to recover interest on the adjudicated amount. However this is not an automatic process and is at the request of the complainant. In many instances the claimant may not know that they can request interest. This interest can be included on the adjudication certificate.

The claimant may also seek reimbursement of adjudication fees (if awarded by the adjudicator) if payment was made prior to finalisation of the adjudication, outstanding adjudication fees may also be added to the adjudication certificate.

Claimants are often owed substantial monies. For many, the process may exhaust their cash reserves prior to the adjudicator’s determination. In extreme cases the claimant may be forced to close their business whilst awaiting a result.
If the respondent fails to pay the adjudicated amount, the certificate must be laid before a court for enforcement as a debt owing. This process also has a timeline, and is subject to many factors, including appeal by the respondent, which may see the recovery process balloon further from that point, compounding the distress felt by the claimant etc.

Whilst the Act provides that the respondent must provide the adjudicated amount to the courts in order to appeal the matter, this appeal can take further time, to which the contractor may have already received a benefit from the contract, which they are not passing onto the subcontractor. If an appeal is granted it may necessitate the need to hire legal representation etc, which adds to cost and time pressures. In many cases this would be an unwinnable situation.

Is the current recovery process using adjudication certificates too lengthy?

What changes could be made to timelines to ease the burden on the claimant but at the same time respecting the rights of the respondent to act?

**General Issues**

In a more general sense:

- Is the Act achieving its objectives in providing the building and construction industry with an effective process to secure payment outside of legal action?
- Is the Act working in a manner which secures timely and fair outcomes?
- Is the process unduly complex? If so, could it be streamlined?
- Is the adjudication process effective?
- If not, are there changes to the Act which can be considered?