

Review of Building and Construction Industry Security of Payments Act 2009 (SA)

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Introduction

1. The *Building and Construction Industry Security of payments Act* (“the Act”) was passed by Parliament in 2009 and received Assent on 10 December 2009.
2. The Act was not, however, proclaimed and finally came into operation on 10 December, 2011 by virtue of Section 7(5) of the Acts Interpretation Act 1915, two years having passed since the Act had received Assent.
3. The reason for this apparent lack of enthusiasm to bring the Act into effect is unclear, but it was possibly a result of there being no clear line of funding for its administration and the Act had trouble finding a bureaucratic home.
4. The Act is currently committed to the Minister for Small Business, the Hon Tom Koutsantonis MP (“the Minister”) and the Small Business Commissioner (“SBC”) is responsible for the administration of the Act. This responsibility was transferred to the SBC from Consumer and Business Services in 2013.
5. The object of the Act is to ensure that a person who carries out construction work or who supplies related goods and services, under a building or construction contract is entitled to receive and able to recover progress payments for carrying out that work, or supplying those goods and services.
6. The Act applies only to those construction contracts entered into after 10 December, 2011. While 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.
7. Since its commencement the Act has been extensively used. The office of the SBC reports that \$35,098,872.61 was claimed through adjudication mechanisms within the Act in the financial year 2013/2014. Of that amount, a total amount of \$9,912,126.08 was awarded to claimants in the same period. The difference between the claimed amount and the awarded amount was \$25,186,746.53. The difference reflects factors such as the variation of costs sought verses actual costs incurred in the estimation process, withdrawal of applications and full payment, or settlement, of the claim by the respondent.
8. The Act is supported by Regulations which also came into effect on 10 December, 2011.

The Review and the Review Process

9. Section 36 of the Act provides:-

36 – Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date on which this Act comes into operation.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 3 years.

10. The Minister appointed me, Mr Alan Moss, a retired Judge of the District Court to conduct the review in December 2014.

11. The review was commenced by the SBC publishing an issues paper in December 2014, which called for submissions on matters raised in that issues paper and on any other matters relating to the Act. Closing date for submissions was 13 February, 2015 but I extended that date to 20 February, 2015 to allow submissions from some major industry bodies to be completed.

This has meant that the time line for the completion of the review has been rather tight, but I am confident that everyone who wished to make a submission has had the opportunity to do so and I believe that I have had adequate time to address the issues which have been identified in relation to the Act.

12. The review was completed on 11 March, 2015. Necessary Cabinet and Parliamentary processes will mean that the review will not be tabled in Parliament until shortly after the time specified in Section 36.

13. I received 24 written submissions and the SBC and I conducted interviews with 8 of the authors of submissions.

Normally I would make a list of all those persons, businesses and bodies making submissions, however some expressed concern that they might be the subject of market place retribution if their participation in the review became known. I am unable to judge how realistic their concerns might be, but I formed the clear impression that they were genuinely held. For this reason I think it is sufficient to report that I received a good

cross section of views from all areas of the construction industry and from industry and other relevant bodies.

The Structure of the Act

14. The Act was based upon the then current legislation in New South Wales and effectively establishes a technical default model, whereby a claimant is deemed to be entitled to payment on a claim pursuant to the Act, unless the respondent provides a “payment schedule” setting out how, or why, payments will be made, or withheld. If the respondent does not provide a payment schedule, or does not pay in accordance with the payment scheduled then the claim, or unpaid portion of the amount in the payment schedule automatically becomes recoverable as a judgement debt in a court of competent jurisdiction. If the claimant is dissatisfied with the payment schedule then the matter may go to adjudication.
15. In particular the Act provides:-
 - (a) Section 3 (2) of the Act ensures that a person is entitled to receive a progress payment for construction work, or goods and services supplied, by granting a statutory entitlement to a progress payment, regardless of whether the construction contract makes provision for progress payments.
 - (b) Section 5 provides a wide definition of “construction work’ but excludes mining work such as drilling, tunnelling or boring for the extraction of oil, gas or minerals. Section 6 provides a wide definition of “related goods and services”.
 - (c) Section 7 (1) of the Act applies to any construction contract written, or oral, even where expressed to be governed by the law of a jurisdiction other than South Australia. Section 7 (2) provides that the Act does not apply to construction contracts which form part of certain loans, or other financial agreements and as already noted, does not apply to construction contracts with the owner of a domestic dwelling in which he, or she intends to reside. The Act does not apply to contracts, the consideration for which is calculated otherwise than by reference to the value of the work, or the goods and services.

- (d) Part 2 of the Act establishes the right to progress payments, the method of formulating the amount of those payments by contractual terms, or by valuation and the method for arriving at a valuation. The due date for payment, if not fixed in the construction contract is 15 days after a progress payment claim is made. "Pay when paid" provisions are rendered ineffectual.
- (e) Part 3 of the Act establishes the procedure for recovering progress payments already outlined in paragraph 14 hereof.
- (f) Division 2 of the Act provides for the adjudication of disputes. A claimant may apply for adjudication of his claim if the amount offered in the payment schedule is less than the claimed amount, or if the respondent fails to pay the full amount in the payment schedule by the due date. The timelines for adjudication are short. An application for adjudication must be lodged within 20 days of the due date for payment; the respondent has 5 days to provide a response to the application and the adjudicator must determine the matter within 10 days, unless the parties agree to a longer time.

If the respondent does not pay the adjudicated amount within 5 days of the determination then the adjudicator may, at the request of the claimant, provide an adjudication certificate which may be filed in court as a judgement debt and recovered accordingly.

The Regulations under the Act provide a list of classes of qualified person who may act as adjudicators.

Division 4 of the Act provides a process for the nomination of adjudicators. The Minister may authorise a person to nominate adjudicators to determine claims under the Act. This authorised nominating authority ("ANA") may charge a fee for this service. The adjudicator may also charge a fee for the adjudication. The Act provides for the regulation of these fees, but this has never occurred.

- (g) Section 23 of the Act also gives a claimant certain rights to suspend construction work where a progress payment has not been made.

16. In summary the Act is claimant biased. Parliament's intention was to protect the small contractor from the market place power of the large construction companies, while also providing a fair adjudication process to prevent abuse of the Act.

17. The questions for this review are:-

- (a) how well has the Act worked in a practice, and
- (b) what changes, if any, should be made to the Act, or Regulations.

The Submissions

18. As one would expect, the submissions contained numerous criticisms about the Act and its operation and suggestions for its improvement. It would be unprofitable for me to examine each and every one of those criticisms and suggestions. Instead I shall concentrate on the recurring themes arising from the submissions and I now turn to discuss them.

Hard Times

19. When construction work is plentiful and there is money in the market place, then things go well in the construction industry. The big construction companies can win profitable tenders and are happy to pay their sub-contractors for prompt, quality work. Disputes only arise about genuine issues of timelines, or quality. However, when times are hard in the building industry, as they currently are in South Australia, the big companies tender on very small profit margins and the sub-contractors claim that the big companies then put pressure on the sub-contractor's profit margins, making it difficult to claim for variations to the contract, making unfair criticisms of work quality and then are slow to pay. Although the big companies would dispute this, the SBC reports that he has dealt with justifiable complaints of this nature from sub-contractors and I heard it often enough to lead me to think there is some substance to this complaint.

Not everyone uses the Act

20. Small builders are often totally reliant on their sub-contractors and will do all they can to retain good ones. A small sub-contractor who becomes dissatisfied with such a builder will often just walk away and spread the word in the trade that the builder is not to be trusted. I understand that the Act is not often used in the small construction area. There is no great imbalance of market power between the parties.

This is also often the case in big construction. Some sub-contractors are national companies with an equivalent, or greater, market power than the head contractor.

Disputes will usually be settled by the parties' specialist construction lawyers, or will proceed to arbitration, or to court.

The class of sub-contractors that seems to need the Act the most are the middle ranking sub-contractors, dealing with big construction firms on major projects. Work on major projects involves a much greater level of complexity and risk. In this environment some sub-contractors will be working at the edge of their experience and competence. They will often have permanent staff and apprentices and will sometimes run their own workshops and factories.

They have little flexibility. A break in their cash flows threatens their viability and the jobs of their staff. It was submitted that the Act affords them protection against unreasonable delay in payment.

The Scheme of the Act

21. A number of submissions strongly criticised the scheme of the Act. The default mechanism process is perceived as unfair by head contractors and the response to claims unnecessarily burdensome.

The processes of the Act, and in particular the operations of ANAs, about which I have more to say below, are seen to be biased in favour of the claimant and this perception has incited lead contractors to challenge the adjudication process in the courts. The courts, it is said, have become increasingly willing to quash adjudicator's determinations upon the basis of apparent bias.

It is suggested that the default mechanism process and the very short response time, push the parties into dispute and consequent adjudication, unnecessarily when an initial process of negotiation would be more successful.

The processes in other jurisdictions, including Western Australia and the Northern Territory were supported, but most submissions favoured the model recently introduced in Queensland.

In brief, the Queensland Act, (*The Building and Construction Industry Payments Act*), provides a statutory entitlement to progress payments and if necessary, an ability to recover such payments through an adjudication process. The Act encourages parties to negotiate when a dispute arises and this is said to be most successful. The Queensland Building and Construction Commissioner is responsible for appointing adjudicators to decide disputes.

The Queensland Act recognises that complex claims should be treated differently to simple claims and that different time frames should apply.

The ANAs

22. The ANAs in South Australia are generally commercial, “for profit”, organisations. They compete with each other for business in the building industry dispute area.

The claimant in a dispute chooses which ANA will appoint the adjudicator (Section 17(3)(b)). A claimant, it is said, is likely to choose an ANA which has a track record of providing favourable claimant outcomes. For the same reason an ANA is likely to appoint an adjudicator with a pro-claimant bias.

Both the ANA and the adjudicator are entitled under the Act to charge for their services. In practice the ANAs do not directly charge for their services, as they wish to encourage claimants to choose them. Instead the ANA makes its money by taking a cut, usually 40%, of the adjudicator’s fee. This process sounds alarm bells for any administrative lawyer.

One submission described this process as “potentially pernicious”. There was certainly no information before me which might lead me to a conclusion that there is actual bias in this system, but I can understand why lead contractors perceive that the process is stacked against them and that this fuels a desire to challenge the process in the courts. It should be remembered also, that recourse to the courts will usually cause the sub-contractors, faced with large litigation costs, to surrender.

Lack of awareness of Act, complexity “One Size Fits All” and timelines

23. There were a number of submissions that sub-contractors were unaware of the Act and that Government and industry bodies should do more to promote its use. Of course some industry bodies represent both big builders and small sub-contractors and may well feel some internal tension on this matter. It was also said that, even if most sub-contractors were aware of the Act, many would be bamboozled by the Act’s legalistic complexities and would find the process too daunting. On the other hand, some sub-contractors have knowingly, or unwittingly, abused the Act by presenting all their invoices as payment claims under the Act, producing an administrative nightmare and cost burden for the head contractor.

There were a number of submissions that the Act makes no distinction between simple and complex claims. The same procedure applies whether the claim is for \$10,000.00 or \$10,000,000.00 and that while the default mechanism may be reasonable for small and simple claims it is absurd to apply it to large and complex claims. By the same token the time limits for the process established by the Act may well be realistic for small claims, but are totally unrealistic for large claims. There were also submissions that the response time of 5 days and an adjudication time of 10 days were very short time-lines for even simple disputes.

Retribution

24. I received a number of oral submissions that sub-contractors were concerned about retribution if they used the Act. I was told that there were a number of major firms which would never employ a sub-contractor again if the Act was invoked against them. I was unable to judge if their fears were well founded, but I had no doubt their fears were genuine and it caused me concern that these perceptions should be alive within the construction industry, but perhaps I am just naïve!

Adjudicators and Adjudications

25. There was a body of opinion in the submissions that there did not appear to be any consistency in training for adjudicators and that currently a new graduate in one of the prescribed disciplines could be appointed as an adjudicator. It was also, reasonably suggested that engineers and accountants should be included as potential adjudicators. There was considerable concern that there was little data on the number and quality of adjudications and that this "lack of transparency" did not encourage confidence in the system.

Home-owner Builders

26. It would appear that home-owner builders were not included in the Act because it was thought that this would simply add another layer of complexity and pressure on people who might already be struggling with difficult and unfamiliar tasks, upon a limited budget and there would seem to be an emotional attraction to this approach. However sections of the building industry feel strongly that home-owner builders should be included in the Act, pointing out that such work as laying concrete slabs, or the installation of air-conditioning equipment, involve the contractor in considerable financial outlay for which

he should be protected, as he would be in any other case. Interestingly a building industry representative body submitted that the Act should not apply, at all, to the construction of stand-alone residential dwellings, (as distinct from apartment blocks), explaining that there are many occasions when the owner does not pay the builder, or is slow in paying. The sub-contractors can use the Act against the builder who is then effectively “caught in the middle” and suffers financially.

This argument very much depends upon which side you are on!

Local Government

27. I received 2 submissions from Local Government bodies suggesting that the Act should not apply to councils. In essence it is argued that the Act conflicts with Section 49 of the Local Government Act which provides that:-

“A council must develop and maintain procurement policies, practices and procedures directed towards-

- (a) obtaining value in the expenditure of public money; and
- (b) providing for ethical and fair treatment of participants; and
- (c) ensuring probity, accountability and transparency in procurement operations.”

It is said that a council which unreasonably withheld payment from a contractor would be in breach of the Local Government Act and that standard local government contracts already have provision for dispute resolution. In short, the situation of councils is already covered by specific legislation and the Act adds a layer of unnecessary complexity to the council's construction operations. With respect I do not think that the various legislation is inconsistent, but I do not intend to explore that legal path. Councils are very large users of sub-contractors in their extensive construction works and I suspect that they may find the use of the Act by sub-contractors irksome and time consuming, but, as the Act binds the Crown and applies to government contracts, it would be a strange legislative policy which bound the State Government, but not Local Government.

Definitions

28. There were many submissions that the definitions in the Act were inadequate, or unclear. Several submissions were concerned about the exemption of mining operations from the definition of “construction work” in Section 5(2) of the Act. Although the subsection would appear to be restricted to primary extraction procedures such as drilling, tunnelling, boring or other underground works, there were questions raised about conveyor belts, tailings dams and the like.

There were other concerns about the definitions of both “construction work” and “related goods and services”. I do not consider that the definitions in the Act are more vague, or unclear, than definitions in other legislation. Definitions cannot cover every eventuality and hence the draftsman attempts to give sufficient examples to indicate a general class which gives guidance as to the extent of the definition. The definition is then refined by court decisions. The adjudicators operating under the Act presumably make decisions about whether certain work is “construction work”, or whether certain goods and services are “related goods and services”, but because these rulings are not published to the industry, no guidance as to the extent of definitions is obtained, nor is there any basis to check upon the consistency of interpretation between adjudicators.

29. What amounts to “construction work” and “related goods and services” may be prescribed by regulation (Sections 5(1)(g) and 6(1)(c) and 6(2)) and it may be prudent to enact regulations clarifying definitions if it can be demonstrated that they are causing genuine confusion in the construction industry.

Discussion

How well has the Act worked in practice?

30. Certainly the Act has been used and sub-contractors have collected substantial payments (see paragraph 7 above). This is primarily what the Act was designed to achieve and in that respect, it has been a success. However the Act may have also served to exacerbate the tensions between head contractors and sub-contractors, which inevitably exist from time to time. Head contractors perceive that the processes under the Act are biased against them and are having recourse to the courts to challenge these processes. When this happens, whatever the outcome, it can be disastrous for the small subcontractor, which is certainly not what Parliament intended.

ANAs

31. At the heart of this dissatisfaction with the Act lies the operation of the ANAs. I have already described the concerns about their business model and operations (see para 22 above). While I have no reason to suggest that the ANAs are acting in any way improperly, there is a real reason for respondents to claims made under the Act to perceive that they may not get a fair go. For the adjudication process to be seen to be fair, there needs to be an impartial appointment of a competent, unbiased adjudicator. It is right that an arbitrator should charge a fee to be paid equally by the parties, but once the person who appoints the arbitrator can be seen to have an interest in the outcome and takes a cut of the arbitrator's fee, then reasonable people may suspect that the outcome may be biased.

It is difficult to see how a "for profit" organisation which is seeking to attract business from sub-contractors wishing to get a favourable result, can be seen to be truly impartial. The only body which could be seen to be truly impartial in this space is an independent government appointee. Such a person would need to be truly independent, seeing that government is currently involved in most major construction in the State. I am aware that the government is keen to cut red tape and reduce unnecessary regulation on business but, if the Act is to work well there would appear to be no alternative other than to give the ANAs role to an independent authority such as the SBC.

The Minister may withdraw the authorisation of the ANAs and appoint the SBC to the task pursuant to Section 29(1) of the Act.

Simple and Complex Timelines

32. The current adjudication procedure is, in my opinion, satisfactory for simple claims. True it puts pressure on the head contractor to respond and pay within tight timeframes, but that is the purpose of the Act. If head contractors are making progress payments in a fair and timely manner, then they should not be troubled by claims under the Act. The timelines within the adjudication process is suitable for simple claims, but seem to me to be far too short for genuinely complex matters.

It seems to me that the adjudication procedures set out in Section 21 of the Act give scope to a wise adjudicator to extend the time for adjudication.

Section 21(3)(b) provides that the parties may agree to extend the time. If, after receiving the matter from, let's say the SBC and perhaps conferring with the SBC, the adjudicator considers the matter to be "complex", then the adjudicator could either encourage the parties to agree to a longer time, or only agree to accept the adjudication if the parties agree to a longer time, or both.

It is arguable that sub-sections (2) and (4) of Section 21 could also be used by the adjudicator to extend the time in complex matters.

The 10 day adjudication time is subject to sub-section (2) which provides that the adjudicator may not begin to consider the matter until the end of the period in which the respondent may lodge the response.

Sub-section 4 provides:-

For the purposes of proceedings conducted to determine an adjudication application, an adjudicator—

- (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
- (b) may set deadlines for further submissions and comments by the parties; and
- (c) may call a conference of the parties; and
- (d) may carry out an inspection of any matter to which the claim relates.

It would appear to be the case that the adjudication in a “complex” matter may set deadlines for further submissions and comments by the parties to a date well outside the 10 days provided for in sub-section (3).

At the moment the Act does not provide a distinction between simple and complex matters, but this might be done by the setting of fees.

Fees

- 33. If the Minister was to appoint the SBC as the sole ANA then a fee sufficient to cover the administrative costs of this service could be determined by the Minister (Section 29 (5)) and enshrined in regulation (Section 35).
- 34. Section 30 of the Act also contemplates the prescribing of the adjudicator's fees by regulation and this could clearly be done under Section 35.

35. Differing scales of fees could be set for matters classed as either “simple” or “complex”.

Matters could be classified in this way by:-

- (a) The amount of the claim.
- (b) The determination of the adjudicator as suggested in paragraph 32 (above).
- (c) By the SBC, either solely, or after conferring with the adjudicator.

The scales of fees could be set after the SBC had conferred with the peak bodies representing adjudicators and arbitrators.

Lack of Data

36. Many submissions complained about the lack of available data and about a lack of transparency in the adjudicator's process. I have the same complaint. I have perused a number of adjudicators supplied to me by an ANA and insofar as I am able to judge, they appear to be satisfactory pieces of work. However, I have no idea how many adjudications have been made, no idea of the number of matters which settled, or at what stage in the process and no clear idea of whether matters have been “simple”, or “complex”. I am not aware if the same sub-contractors are making most of the claims, or how many head contractors are involved and how often. It may be that the practice of delaying progress payments is wide spread, as some have claimed, or it may be that it is limited to a few, perhaps less scrupulous, head contractors.

Publication of adjudications made under the Act would seem to be desirable. Hopefully transparency about the process and outcomes would go a long way to restoring confidence amongst respondents. It would also promote consistency in the use of definitions and would, in time, establish a frame of reference for adjudications and a basis for the collection of meaningful data.

Of course there may be perfectly legitimate reasons, in a given case, why the parties would not want their adjudication published and one would not wish to discourage use of the Act by mandating universal publication.

If, as I have suggested, the SBC were to become the sole ANA, then I can see no reason why, as part of his administrative practice, he could not require copies of all adjudications be provided to him and once in his possession, he could not publish them.

He could give reasonable administrative consideration to representations from the parties to keep adjudications private and he could produce guidelines for his decisions. If this procedure was thought too informal then, although I am not an expert in the extent of subordinate legislation, the regulation making powers in Section 35 of the Act would appear to be wide enough to accommodate regulations for this purpose.

Home-owner Builders

37. Like many people I have had experience in having houses built by builders and in personally employing tradesmen to do small building work and alterations. There is no doubt these experiences can be mentally and emotionally taxing, but if a person embarks on such an enterprise then they must necessarily accept the responsibilities that come with it. I can see no reason why a home-owner builder should not be expected to responsibly arrange his, or her, finances to enable reasonable progress payments to be made. If the home-owner builder cannot do that, then probably he, or she, should never have embarked on the project in the first place. I can see no reason, in principle, why the tradesman should be expected to act as the home-owner builder's unwilling banker and it follows that I can see no reason why the Act should not apply to home-owner builders.

This would require an amendment to the Act.

Definitions

38. If the SBC were to become the sole ANA, then I would suggest that he consult with the industry to ascertain which definitions are the cause of genuine concern and then seek the advice of the Crown Solicitor as to whether these definitions, if any, could be clarified by regulation.

What changes, if any, should be made to the Act

39. The short answer is that the Act should be amended, but not yet!

Ideally the Act should be amended to address the issues I have canvassed above, including ANAs, simple and complex adjudications, timelines, fees, data, home-owner builders and definitions, however I am by no means sure that, that is all that is needed.

Reviewers will always want more data, but seldom has a reviewer had less data than I have had in this case. The Act was really cast adrift on the sea of the market place and no-one really took responsibility for it. The SBC has done his best in the short time since his appointment, but all I have really had to work with are the opinions of the various players in the building and construction industry and as I have noted, these vary greatly, depending on the roles they play.

Much more hard information is required before good policy decisions can be made about amendments to the Act. For this reason the reader will notice that I have concentrated my discussion around fundamental matters which I believe may be addressed by using the powers already in the Act and changes, or additions which may be made quickly by regulation. These changes should be allowed to operate for 2 or 3 years and then the Act should be reviewed for the purpose of introducing amendments to it.

I intend the recommendations I set out below not only to invite the necessary action, but also to give a picture of the way I would see the Act being administered over the next 2 or 3 years before amendment is considered.

Recommendations

40. I make the following recommendations:-

- (a) That the Minister withdraw all authority from the current ANAs (Section 29(1)9b)).
- (b) That the Minister appoint the SBC, upon the SBC's application, to be the sole ANA (Section 29(1)(a)).
- (c) That the SBC should give such information, or advice, or offer mediation to would be claimants under the Act as he considers consistent with his legislative charter.
- (d) That all applications for adjudication be made to the SBC as the sole ANA (Section 17(3)).
- (e) That fees be fixed to cover the administrative costs of the SBC for his services as ANA (by regulation).

- (f) That the SBC, as the ANA, refers the application for adjudication to an adjudicator whom he considers to be competent and unbiased (Administrative action; Section 19).
- (g) That scales of fees be set for both "simple" and "complex" adjudications (by regulation).
- (h) That either the SBC, as the ANA, or the adjudicator determines whether the adjudication is "simple", or "complex" (by regulation).
- (i) That the adjudicator make the adjudication in accordance with the Act, making use of the current provisions in the Act to extend time limits in complex matters, where possible (Section 21, see paragraph 32 above).
- (j) That the SBC collect data upon the operation of the Act, collect all adjudications and publish all adjudications except those which he considers may cause unreasonable loss, or damage to the parties, if published (Administrative action; regulations to be considered).
- (k) That consideration be given to enacting regulations clarifying critical definitions nominated by the SBC (by regulation).

41. I thank the Minister for giving me the opportunity to conduct this Review.


Alan Moss
Retired District Court Judge

12 / 13 / 2015