

**PAYMENT PROBLEMS?
A REVIEW OF THE BUILDING AND CONSTRUCTION INDUSTRY
SECURITY OF PAYMENT ACT 1999 (NSW)**

REVIEW

The Department of Commerce has recently undertaken a review of the *Building and Construction Industry Security of Payment Act 1999* in accordance with Section 38 of the Act to determine if the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The Department of Commerce invited comment from key construction industry stakeholders and other interested parties from December 2003 to March 2004. Submissions were received from industry and employer associations, Authorised Nominating Authorities, adjudicators, law firms, builders, contractors and subcontractors and developers.

STATISTICS

A common problem flagged by industry is that parties who are liable to pay, invariably ignore payment claims to delay or escape payment. Approximately 33% of those liable to pay failed to respond at all to payment claims under the Act, even after being offered the opportunity to do so twice.

The majority of payment disputes occur at the lower end of the market. 57% of the applications related to disputes on payment claims less than \$50K, and approximately 86% of the applications related to disputes on payment claims less than \$250K. The size of payment claims subject to adjudication applications ranged from \$389 to \$33.5M indicating that the legislation is being used throughout the industry.

Approximately 44.75% of adjudications were resolved fully in favour of the claimant, 9% resolved fully in favour of the respondent and 46.25% were resolved partially in favour of the claimant. These statistics provide some evidence that smaller claims are succeeding under the Act. This should assist the smaller contractors obtain cash flow for their businesses. However, as a claim becomes larger it is less likely for the claimant to obtain a determination fully in their favour.

FEEDBACK

Overall, the responses were positive and supportive of the intentions and operation of the Act. Review feedback indicated that the Act is bringing parties together early in a dispute and in many cases the parties are then settling their dispute without having to rely on arbitration or court action.

There were a number of submissions suggesting that the scope of the Act should be expanded to capture all forms of dispute under a contract. Examples given as acceleration, prolongation, delay, quantum meruit, damages, variation approval, defective work evaluation and contract interpretation. Those in favour of expansion espoused the advantages to industry in having these forms of disputes resolved under an interim dispute resolution regime. It was claimed that this would save industry on litigation costs and disruption of works. On the other hand, many respondents questioned whether the system has the capacity to properly deal with such issues and a number cautioned that Government should consider allowing the present system to "bed down" before fundamentally changing the objectives of the Act. Others suggested that before considering expanding the scope, a cost benefit analysis should be undertaken in the knowledge that substantial amendments would be required to facilitate such a proposal. Other suggestions received were to allow respondents to claim against claimants, to include penalties on respondents who fail to make payment and to include tendering "service" fee costs within the scope of the Act.

SUGGESTIONS

Numerous constructive suggestions have been made to further improve and clarify certain aspects of the Act's operation. These suggestions include:

- clarifying and rationalising certain definitions and requirements under the Act;

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- clarifying and reassessing some exemptions and limitations currently provided under the Act;
- introducing additional provisions voiding unacceptable contract terms, similar to the current Pay when Paid provisions;
- standardising adjudication application processes;
- providing for the withdrawal, grouping and referral of adjudication applications;
- providing adjudicators with more time to undertake determinations;
- enabling adjudicators to deem an adjudication application invalid;
- addressing issues arising from court challenges;
- addressing concerns relating to adjudication fees; and
- introducing minimum adjudicator qualifications.