

# **BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS AMENDMENT BILL 2014**

## **Explanatory Notes**

**for**

## **Amendments to be moved during consideration in detail by the Honourable Tim Mander MP, Minister for Housing and Public Works**

### **Title of Bill**

Building and Construction Industry Payments Amendment Bill 2014

### **Objectives of the amendments**

The objective of the amendments is to address recommendations by the Transport, Housing and Local Government Committee (the Committee) in its report No.52 - Building and Construction Industry Payments Amendment Bill 2014 (Committee Report) tabled in the Legislative Assembly on 1 September 2014.

The amendments also address some of the issues raised in submissions made to the Committee during the Committee's consideration of the Building and Construction Industry Payments Amendment Bill 2014 (the Bill).

### **Achievement of the objectives**

#### Court's discretion regarding jurisdictional error:

Clause 37 of the Bill amends section 100 (Effect of pt 3 on civil proceedings) by introducing section 100(4) which provides that where a court finds that only part of an adjudicator's decision is affected by jurisdictional error, it must identify the part affected by the error and allow the part of the adjudication decision not affected by the error to remain binding on the parties to the proceedings.

An amendment is required to clause 37 of the Bill to provide the court with a discretion to enforce part of a payment, rather than a direction to do so.

#### Definition of complex payment claim:

As noted in the Committee Report, several submissions raised concerns about the lack of clarity in the definition of complex payment claim and the complexity of distinguishing between complex and standard claims on the basis of latent condition and time-related cost. The Bill is therefore to be amended to remove the inclusion of both latent conditions and time-related costs from the definition of complex payment claim.

This amendment will ensure that complex payment claims are restricted to claims for more than \$750,000 (exclusive of GST), or a greater amount prescribed by regulation, removing the complexity around what constitutes latent conditions and time related claims.

An amendment to the definition of complex payment claim in the Bill will also clarify that the value of the payment claim is exclusive of GST. This reflects the fact that it is usual practice in the construction industry to submit claims for payment on a GST exclusive basis.

#### Board policies:

Under the Bill the Adjudication Registrar will have the power to appoint adjudicators. To ensure transparency and confidence in the Registrar's power to nominate adjudicators it is proposed that the Queensland Building and Construction Board (QBC Board) will publish a board paper which sets out the selection criteria that is to be followed by the registrar, and any appropriately qualified registry staff as delegated by the registrar, in the nomination of adjudicators.

It is intended that the implementation of a QBC Board policy of this nature will allay concerns raised by the Committee surrounding the discretionary power of the registrar to determine which adjudicator receives which adjudication application.

#### Definition of defects liability period:

In response to a submission to the Committee, amendments are also to be made to clarify the definition of defects liability period in clause 6 of the Bill.

#### Regulation Making Power:

An amendment is to be made section 111(2) of the *Building and Construction Industry Payments Act 2004* (the Act) to insert a power for the making of a regulation by the Governor in Council in relation to the procedures for the lodgement and processing of adjudication applications to and by the Adjudication Registrar.

#### Miscellaneous Amendments:

Submissions to the Committee also identified a number of changes and drafting corrections that were required to the Bill and these are reflected in these amendments.

#### Training of adjudicators:

A transitional provision is to be added to the Bill to clarify that the registrar has the power to require completion of transitional training by registered adjudicators.

While the training will cover the changes to be brought about by the amendments in the Bill, the training will also go beyond that in dealing with areas identified as necessary for training of adjudicators to include contract law, construction law, construction contracts, practical elements of construction, natural justice, judicial ethics and a refresher on conduct and decision writing.

### Adjudication already commenced:

The Committee recommended that the Bill be amended to state clearly how claims, schedules and adjudication applications which have already commenced are to be treated under the amended Act. Transitional provisions have been included in these amendments to address this issue.

### **Alternative ways of achieving policy objectives**

There is no alternative way to achieve these objectives other than by amending the Bill.

### **Estimated cost for government implementation**

There are no additional anticipated financial costs for Government arising from the amendments to be moved during consideration in detail.

### **Consistency with fundamental legislative principles**

The amendments to be moved during consideration in detail are consistent with fundamental legislative principles.

### **Consultation**

The amendments result from recommendations by the Committee which conducted public consultation on the Bill.

### **Notes on provisions**

*Amendment 1* removes proposed new section 17(2)(d) from the Bill. This new provision was to require that a payment claim must identify whether it is a standard payment claim or a complex payment claim. However, this provision is no longer required. This amendment is required as a result of the change to the definition of complex payment claim in Amendment 25.

*Amendment 2* amends the definition of defects liability period in clause 6 of the Bill to provide clarification in response to submissions made to the Committee.

*Amendment 3* clarifies section 18A(1) so that it is clear that the section applies if, in reply to a payment claim, the respondent serves a payment schedule on the claimant.

*Amendment 4* inserts new subsections 19(5) and (6) (Consequences of not paying claimant if no payment schedule). Under proposed new section 19(5), the claimant can only start proceedings under subsection (3)(a)(i) to recover the unpaid portion in any court of a competent jurisdiction if they have first given the respondent a notice under section 20A(2) and the time for the respondent to serve the payment schedule, as stated in the notice, has ended.

*Amendment 5* makes amendment to clause 10 of the Bill as a consequence of amendment 6 as set out below.

*Amendment 6* reinstates current section 20(4) of the Act so that it is no longer omitted.

*Amendment 7* inserts a new section 20A. The intention of this amendment is to clarify the circumstances in which prior notice is required before starting legal proceedings.

*Amendment 8* make amendments to sections 21(2)(a) and (b). The amendment clarifies that an adjudication application under section 21(1)(b) cannot be made unless the claimant first gives the respondent a notice under section 20A(2) and the time for the respondent to serve the payment schedule, as stated in the notice, has ended.

*Amendment 9* inserts a new subsection 24B(7) which provides that if a claimant proposes to give the adjudicator a claimant's reply, the claimant must first give the adjudicator notice of the proposal within five business days after receiving a copy of the adjudication response unless the claimant gives the reply within five business days.

*Amendment 10* removes proposed new sections 25(6) and (7) which currently deal with circumstances when the adjudicator decides that a payment claim has been incorrectly identified as either a complex or standard payment claim. These provisions are no longer required as a result of the amendment to the complex claim definition which has the effect of no longer providing for identification of a payment claim as standard or complex. Nevertheless, if circumstances do arise as to whether a claim is standard or complex, they will become a jurisdictional issue and dealt with accordingly by the adjudicator.

*Amendment 11* inserts a new section 25A which deals with time requirements for adjudication proceedings. The amendments cater for the non-receipt of a claimant's reply and also for the situation where a reply is not given by a claimant so that the adjudicator is aware of whether or not a reply will be given and will not be negatively impacted the time they have to make a decision.

*Amendment 12* makes a consequential amendment to new section 25B(1)(b) to correct a reference to section 25A(4) to read 25A(2).

*Amendment 13* makes amendment to new section 25B(1)(b) to remove the requirement that the claimant and respondent have attempted to reach agreement to an extension of time for an adjudication decision. The requirement that the claimant respondent have failed to reach agreement will remain.

*Amendment 14* makes a consequential amendment to new section 25B(2) to correct references to section 25A(3) to read 25A(5) or (6).

*Amendment 15* removes a reference in section 32(2)(a) of the Act to an authorised nominating authority and inserts a reference to the registrar. This is consistent with other amendments in the Bill which remove the role that authorised nominated authorities are to play in the adjudication process under the Act.

*Amendment 16* removes proposed new section 34 from the Bill. This is a consequence of the amendments removing the requirement that a payment claim must identify whether it is a complex or standard payment claim.

*Amendment 17* inserts a new clause 34A into the Bill which omits section 85 of the Act. Section 85 is no longer required as it relates to the registrar issuing adjudication

certificates in circumstances where an authorised nominating authority is suspended or cancelled or has otherwise ended after a claim has been referred to an adjudicator. Given that authorised nominating authorities will no longer be involved in the adjudication process under the Act the provision can be removed.

*Amendment 18* amends clause 37 of the Bill so that new section 100(4) provides that if a court finds that only part of an adjudicator's decision under part 3 of the Act is affected by jurisdictional error then the court may, rather than must, identify the part affected by the error and allow the part of the decision not affected by the error to remain binding on the parties to the proceeding. This amendment will allow the court discretion to enforce a part of a payment, rather than a direction to do so as is currently provided by the Bill.

*Amendment 19* inserts a new section 101 which allows the Queensland Building and Construction Board to make a policy governing the administration of the Act. Any such policy does not take effect until it is approved by regulation.

*Amendment 20* inserts a new clause 41A into the Bill which amends section 111 (Regulation-making power) of the Act. The amendment inserts a power for the making of a regulation in relation to procedures for the lodgement and processing of adjudication applications to and by the registrar.

*Amendment 21* amends the definition of application for renewal of registration to clarify that it relates to the registration of an authorised nominating authority.

*Amendment 22* removes the definition of commencement in the transitional provisions as it is not required given that commencement is adequately provided for in the *Acts Interpretation Act 1954*.

*Amendment 23* inserts a transitional provision which provides for how adjudication applications which are made but not yet referred to an adjudicator before the commencement of the Amendment Act are to be dealt with.

*Amendment 24* inserts a transitional provision which provides for how a construction contract entered into before the commencement of the Amendment Act is to be dealt with. The existing recovery of progress payment provisions continue to apply for the recovery of progress payments relating to the construction contract as if the provisions had not been amended by the amending Act. However, the changes made under the amending Act and relating to the functions of the authorised nominating authorities being transferred to the registrar do apply to the construction contract.

*Amendment 24* also introduces a new section 116 which provides that the Registrar may impose a condition on the registration of an adjudicator that requires the adjudicator to complete mandatory transition training prescribed by regulation and to pay the cost of the training prescribed by regulation. New section 116 expires six months after its commencement.

*Amendment 25* amends the definition of complex payment claim to remove references to latent conditions and time related costs. The amendment also clarifies that the value of the claim is to be exclusive of GST. This amendment will ensure that complex payment claims are restricted to claims for more than \$750 000 (exclusive of GST), or a greater amount prescribed by regulation, removing the complexity around what constitutes latent

conditions and time related claims. The amendment also inserts a new definition for the claimant's reply and refers to new section 24B(2).