

CLAUSE NOTES

Building and Construction Industry Security of Payment Bill 2009

PART I PRELIMINARY

- Clause 1:** Sets out the name (also called the short title) of the proposed Act.
- Clause 2:** Provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
- Clause 3:** Sets out the objects of the proposed Act.
- Clause 4:** Defines certain words and expressions that are used in the proposed Act. These include the core concepts of *building or construction contract* (which means a contract or other arrangement under which one party undertakes to carry out building work or construction work for or to supply building or construction-related goods and services to, another party), *building work or construction work* (which is defined at clause 5) and *building or construction-related goods and services* (which is defined at clause 6).
- Clause 5:** Defines the expressions *building work* and *construction work* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.
- Clause 6:** Defines the expressions *building or construction-related goods and services* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

PART 2 APPLICATION AND EFFECT OF ACT IN RELATION TO OTHER ACTS, CONTRACTS & C.

- Clause 7:** Provides for the application of the proposed Act to all building or construction contracts, whether written or oral. Certain classes of contract are excluded from the

proposed Act, as are certain classes of contractual provisions. Other classes of construction contract can be excluded from the proposed Act by regulations under the proposed Act.

- Clause 8:** Provides that the proposed Act is to bind the Crown.
- Clause 9:** Ensures that a claimant retains entitlements and remedies that may be established under a building or construction contract or elsewhere.
- Clause 10:** Ensures that nothing done under the proposed Act will affect any civil proceedings arising under a building or construction contract, except that a court will be required to make appropriate set-offs and any orders necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.
- Clause 11:** Avoids any provision of an agreement that purports to exclude, modify or restrict the proposed Act.

PART 3 RIGHTS TO PROGRESS PAYMENTS

- Clause 12:** Provides that on and from each reference date, a person who has undertaken to carry out building or construction work, or to supply related goods and services, becomes entitled to a progress payment. A *reference date* is a date ascertained in accordance with the terms of the building or construction contract as a date for making a claim for a progress payment or as a date by reference to which the amount of a progress payment is to be calculated or, if the contract contains no such terms, on the last day of each month in which building work or construction work is carried out or building or construction related goods and services are supplied, under the contract.
- Clause 13:** Provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.
- Clause 14:** Provides for claimants to exercise a lien in respect to any unpaid amount over unfixed plant and materials supplied

by the claimant in connection with the building or construction work being carried out by the respondent.

Clause 15: Provides that a progress payment becomes due and payable in accordance with the terms of the construction contract or, if the contract contains no such terms, at the end of 10 business days after a progress claim is made in relation to that payment under section 17 of the bill.

Clause 16: Provides that a 'pay when paid' provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a building or construction contract. A 'pay when paid' provision is a provision that makes one person's payment dependent on another person's payment.

PART 4 PAYMENT CLAIMS AND PAYMENT SCHEDULES

Clause 17: Enables a person who is entitled to a progress payment under proposed section 12 (the Claimant) to serve a payment claim on the person who is liable to make the payment. The claim will set out the amount to which the claimant claims entitlement.

Clause 18: Enables a person on whom a payment claim is made (the Respondent) to reply to the claim by providing a payment schedule to the claimant. The schedule will set out how much the respondent proposes to pay the claimant and when.

Clause 19: Provides that a claimant will be able to recover the whole amount of his or her claim as a debt, and provides the option to suspend carrying out building or construction work, or supplying related goods and services, if the respondent fails to provide a payment schedule within the time allowed under clause 18.

Clause 20: Provides that a claimant will be able to recover the amount set out in the respondent's payment schedule, and provides the option to suspend carrying out building or construction work, or supplying related goods and services, where the respondent provides the payment

schedule within the time allowed under clause 18 but fails to pay that amount by the due date referred to in clause 15.

PART 5 ADJUDICATION OF DISPUTES

- Clause 21:** Enables a claimant to apply for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within 10 days after the claimant receives the payment schedule, and will be able to be made directly to an authority authorised to nominate adjudicators for the purposes of the proposed Act.
- Clause 22:** Provides that the appointment of an adjudicator is effected by the adjudicator causing notice of his or her acceptance of the adjudication application.
- Clause 23:** Enables the respondent to lodge with an adjudicator the respondent's response to the claimant's adjudication application.
- Clause 24:** Sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application. Enables an adjudicator to obtain further submissions, undertake an inspection or to call a conference of the parties to the adjudication.
- Clause 25:** Provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid.
- Clause 26:** Provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount within 5 business days of receiving the adjudicator's decision, unless the adjudicator determines a later date is suitable. If the respondent does not pay the claimant has the opportunity to request an adjudication certificate, and to suspend

carrying out construction work, or supplying related goods and services, while the amount remains unpaid.

Clause 27: Provides that a claimant will be able to recover the adjudicated amount as a debt in a court.

Clause 28: Enables a claimant to make a new adjudication application in the event that a previous application is not accepted by an adjudicator within 4 business days after it is made or if an adjudicator fails to determine the application within the time allowed under clause 24.

PART 6 CLAIMANT'S RIGHT TO SUSPEND BUILDING WORK OR CONSTRUCTION WORK OR SUPPLY

Clause 29: Entitles a claimant to suspend the carrying out of building and construction work (or the supply of related goods and services) if at least 2 business days have passed since notice of intention to do so has been given as referred to in clause 19, 20 or 26. A claimant who suspends the carrying out of building or construction work (or the supply of related goods and services) under the proposed section will be immune from civil liability as a consequence of doing so.

PART 7 ADMINISTRATION

Clause 30: Provides for the establishment of a Security of Payments Official to appoint Nominating authorities and to monitor the operation of the proposed Act.

Clause 31: Enables the Security of Payment Official to authorise persons as nominating authorities (to nominate adjudicators for the purposes of the proposed Act) and to revoke any authority so given. The Security of Payments Official's decision in this regard will be reviewable by the Magistrates Court (Administrative Appeals Division).

Clause 32: Enables nominating authorities to charge fees for services associated with an adjudication application and allows the Minister administering the proposed Act to limit the amount of fees that can be charged by a nominating authority for such services.

- Clause 33:** Provides for nominating authorities to provide information to the Security of Payments Official in relation to activities of the authority under the proposed Act.
- Clause 34:** Provides for nominating authorities to notify the Security of Payments Official if the authority becomes aware that an application has been made to a court in respect to an adjudication application.
- Clause 35:** Provides for the disqualification of an adjudicator if he or she has a material personal interest in a building or construction contract, dispute, or party to the contract, to which the application relates.
- Clause 36:** Provides for parties to adjudication to request the adjudicator to disqualify themselves or provides for an application to the Magistrates Court (Administrative Appeals Division) for a review of the decision not to disqualify.
- Clause 37:** Provides for the fees payable to an adjudicator in relation to his or her adjudication of an adjudication application under proposed Part 5. In particular, an adjudicator will not be entitled to be paid any fees if he or she fails to determine such an application within the time allowed under clause 24.
- Clause 38:** Provides for nominating authorities to forward copies of adjudicators determinations to the Security of Payments Official and for the Security of Payments Official to publish determinations and supply the Building Regulation Advisory Committee with an annual report in respect of the operation of the proposed Act.
- Clause 39:** Ensures that no action will lie against an adjudicator, nominating authority or the Security of Payments Official or any other person for anything done or omitted to be done in good faith in performing their functions under the proposed Act.

PART 8 MISCELLANEOUS

- Clause 40:** Deals with the service of notices under the proposed Act.

- Clause 41:** Enables the Governor to make regulations for the purpose of the proposed Act.
- Clause 42:** Provides that a notice is not a statutory rule for the purposes of the *Rules Publication Act 1953*.
- Clause 43:** Provides for the administration of the proposed Act to be assigned to the Minister for Workplace Relations and further provides for the Department of Justice to be responsible to that Minister in relation to the administration of the proposed Act.
- Clause 44:** Provides for the continued application of the *Contractors Debts Act 1939* in respect of any attachment notice that is issued by a court before the day on which that section commences and to any payment into court of money pursuant to such a notice.
- Clause 45:** Provides that the Principal Act is the *Judicial Review Act 2000*.
- Clause 46:** Amends Schedule I of the Principle Act by inserting the *Building and Construction Industry Security of Payment Act 2009*, so that a decision of an adjudicator is not subject to the Principal Act.
- Clause 47:** Provides for the repeal of the *Contractors Debts Act 1939*.

SCHEDULE I LEGISLATION REPEALED

Schedule I Repeals the *Contractors Debts Act 1939*.