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CONSTRUCTION CONTRACTS ACT 2004

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Why?

- Security of Payment Taskforce - Report to the Minister of Housing and Works (November 2001)
- Payment problems
 - slow or disputed payment
 - paid when paid clauses
 - insolvency
- Unethical Conduct
 - bid shopping
 - deliberate underpayment of claims

How?

- Prohibiting payment provisions that slow or stop funds
- Implying fair and reasonable payment terms
- Ownership of unfixed materials generally and on insolvency
- Rapid adjudication process
- Ability to suspend work if not paid
- Not able to contract out of the Act

When does the Act apply?

Act applies to:

- a '**construction contract**' for
- '**construction work**' where
- that work takes place on a '**site in WA**'

When does the Act apply? (cont'd)

'**construction contract**' means:

- Agreement to carry out construction work
- Supply of goods to site related to construction work
- Provision of professional services related to construction work on and off site includes surveying, planning, costing, testing, engineering,project management (Act refers to '**contractor**')
- Provision of on-site services related to construction work

When does the Act apply? (cont'd)

'**construction work**' has an extremely wide definition:

- Reclaiming, draining preventing subsidence of land (and associated works, apparatus, plant)
- Civil works and constructing a building or structure (and fitting or installing anything in or on these items)
- Altering, repairing, restoring, maintaining, extending, dismantling or demolishing anything in respect to civil works etc
- Anything that is preparatory to, necessary for, integral to, for the completion of above

When does the Act apply? (cont'd)

- '**site in WA**' means on land and off shore
- Contract does not need to be executed in WA
- Immaterial if contract is subject to jurisdiction of other state or country
- No need for agreement in writing
- Binds the Crown

When doesn't the Act apply?

- Oil, natural gas and mineral exploration and exploitation (processing) but note inclusion of pipelines
- Constructing, installing, repairing, altering wholly artistic works, sculptures, installations and murals
- Accounting, financial and legal services
- Water craft
- Contracts of employment
- Contracts under the *Home Building Contracts Act*
- Other contracts, goods, professions, on site services that may be prescribed by regulation

Act implies terms - unless contract deals with term in writing

- Variations
- Entitlement to be paid
- Entitlement to progress payments
- Making claims for payment (Form and note)
- Responding to claims for payment (Form)
- Time for payment (28 days from claim for payment)
- Interest on overdue payments
- Ownership of goods
- Unfixed goods on insolvency
- Retention money

Interpretation Act applies to method of service)

Prohibited provisions and contracting out

Prohibited provisions

- Paid when paid clauses
- Time for payment in written contracts greater than 50 days defaults to 28 days

No contracting out/no waiver

- Agreement or any arrangement
- In writing or not
- That excludes or modifies operation of the Act
- Cannot waive rights under the Act

Applying and responding to adjudication process

There must be a *'payment dispute'* -

- a claim has not been rejected but has not been paid
- a claim has been rejected or wholly disputed
- retention monies not returned
- security not returned.

Application must be in writing within 28 days of dispute -

- construction contract involved or relevant extracts
- the payment claim that gave rise to the dispute
- any other information/documentation/submissions the party will rely on.



Applying and responding to adjudication process (cont'd)

Application must be served:

- on the other parties to the contract
- adjudicator (if appointed and they consent)
- prescribed appointer (5 days to appoint)

Response must be served in writing within 14 days of application and must:

- set out rejection of payment claim
- any other information/documentation/submissions the party will rely on.



Adjudicate or dismiss?

Unless parties consent to an extension payment dispute must be adjudicated or dismissed within 14 days of service of response or from date it should have been served

- Is it a *'construction contract'* ?
- Has the application been made in the correct form?
- Has a court or other body made an order affecting the subject matter of the dispute (or application for adjudication already been made or matter already been adjudicated)?
- Fair determination (complexity, time, other reasons)?



Likely subject matter of adjudications

- Quality of the work completed
- Quantity of the work completed or yet to be completed
- The scope of work under the contract
- Variations to the work under the contract
- Valuing a variation to the contract works
- Rectification of defective work
- Delays and determining responsibility for them



Likely subject matter of adjudications (cont'd)

- Costs in the event of delay
- Determining if an extension of time should be granted and for how long
- Liquidated damages as a penalty
- Procedures for requesting an extension of time
- Procedures for lodgement of progress claims
- Time for payment and progress payments



Affect of dismissal or a failure to adjudicate

- If adjudicator fails to adjudicate or dismiss then a deemed dismissal and application may be made again (no costs payable to the adjudicator)
- If the application is dismissed then dismissal and the reasons for the dismissal must be communicated to the parties (costs of adjudicator payable)
- A party *'aggrieved'* by a dismissal (not on merits) may apply to the State Administrative Tribunal for a review of the decision. If set aside - determination within 14 days



Adjudication Procedure

- An adjudicator who has a '**material personal interest**' in the dispute, the construction contract or is a party to the contract is disqualified from acting and must notify the parties
- Object is to determine dispute fairly, quickly, informally and inexpensively
- Determine on the balance of probabilities who is to make payment or return security
- Not bound by rules of evidence
- Bound by rules of natural justice



Adjudication Procedure (cont'd)

- To the extent the Act or regulations do not apply the appointed adjudicators may determine their own procedure
- If not able to make a determination on the application for adjudication and response the appointed adjudicator may:
 - request further submissions or information within a deadline;
 - request that the parties attend a conference
 - unless all parties object, inspect, arrange to test or engage an expert to inspect the subject matter of the adjudication.



Adjudication Procedure (cont'd)

- The adjudicator may with the consent of the parties:
 - extend the time for determination
 - adjudicate simultaneously 2 or more payment disputes between the parties or another party
- If simultaneously adjudicating 2 or more payment disputes information gained in 1 may be used in another



Interest and Costs

- The appointed adjudicator may award interest up to and including the date of determination either in accordance with the contract or otherwise in accordance with section 142 of the SCA 1935
- Costs of adjudicator and disbursements shared equally
- The appointed adjudicator may award costs to a party if another party:
 - engages in frivolous or vexatious conduct
 - makes unfounded submissions



Adjudicators decision

Adjudicators decisions must:

- be in writing
- be prepared in accordance with regulations
- give reasons for decision
- identify information that is confidential and not suitable for publication by Registrar
- be given to the parties to contract and Registrar
- state when and amount to pay or security to be returned.



Effect of adjudication process and determination

- Adjudication process no bar to other civil proceeding
- Other civil proceeding no bar to adjudication unless the issues in dispute have been the subject matter of a decision
- Unless the determination provides otherwise interest accrues and forms part of determination on any part of determination not paid by due date
- A determination in respect to the part performance of the contractors obligations is payment on account



Effect of adjudication process and determination (cont'd)

- If money due under a determination is not paid by the principal to the contractor then the contractor may give notice and suspend work
- With leave of the court the determination may be enforced in the same manner as an order of the court but adjudication must be signed by the adjudicator and certified by the Registrar for *Construction Contract Act*



Effect of adjudication process and determination (cont'd)

- A determination is final unless the parties consent to amendment or cancellation and a party may not apply to have the same subject matter re-adjudicated.
- Exceptions and partial exceptions are:
 - judicial review of determination (limited)
 - judicial review of dismissal
 - claim of material personal interest before determination made
 - 'slip rule'.



Summary on Act

- Prohibiting payment provisions that slow or stop funds
- Implying fair and reasonable payment terms
- Ownership of unfixd materials generally and on insolvency
- Rapid adjudication process
- Ability to suspend work if not paid
- Does not apply to oil, mineral and natural gas exploration/exploitation, employment, HBCA, art, watercraft
- Not able to contract out of the Act



Practical Considerations

- Likely to be level of applications for adjudications initially
- Level may reduce as Act forces parties to confront payment disputes early
- Ensure that records and files are up to date so that documentation relevant to the issues in dispute can be readily identified (positive contract management)
- Ensure that personnel that are involved in circumstances surrounding the dispute are available to assist



Practical Considerations (cont'd)

- Express all contracts in writing unless you are fully aware of the affect of terms that will be implied via the Act
- Consider agreeing on adjudicator
- Be prepared to keep to the Act:
 - application must be served within 28 days of payment dispute (if not served then no application possible)
 - 14 days to file a response (if late same as no response)
 - application and response must contain all submissions on law and documentation that parties seek to rely on



Practical Considerations (cont'd)

- Consider if the payment dispute will require expert evidence such as a quantity surveyor
- Get assistance early whether claimant or respondent
- Be practical and consider the merits of the claim
- Remember that an adjudication with leave of the court can be enforced as an order of the court -you will pay



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