
Question and answer guide

Edition 3, 1 July 2008

Northern Territory *Construction Contracts (Security of Payments) Act* and *Construction Contracts (Security of Payments) Regulations* (“the legislation”).

This guide sets out how the Department of Justice considers the legislation is to operate. It has been developed in consultation with other Agencies and the members of the Construction Industry Reference Group. However, the contents should not be taken as being formal legal advice on any particular issue.

This guide is divided into parts dealing with, respectively, questions about:

- introductory information (see questions 1-7);
- transitional matters (see questions 8-10);
- contractual matters (see questions 11-19);
- disputes (see questions 20-29);
- prescribed appointers (see questions 30-34);
- registered adjudicators (including the registration process) (see questions 35-44);
- adjudication decisions (see questions 45-47);
- enforcement of decisions of registered adjudicators (see questions 48-51);
- workmen’s liens legislation (see question 52);
- costs (see questions 53-56);
- role of the Courts (see questions 57-58);
- miscellaneous matters (see questions 59-64);
- adjudicator training requirements (see questions 65-66);
- precedents for the operation of the legislation (see question 67); and
- further queries.

INTRODUCTORY INFORMATION

1. What is the general nature of the legislation?

The main provisions of the Act are:

- a series of provisions that make certain contractual clauses illegal – see questions 16 and 17;
- if a contract does not have written provisions dealing with certain types of contractual matters it will be deemed to have the relevant provisions as set out in a schedule to the Act – see questions 14 and 18; and
- provisions dealing with adjudication of disputes – see questions 20 and 55.

2. What comprises the legislation?

The legislation is comprised of:

- the *Construction Contracts (Security of Payments) Act* (“the Act”);
- the *Construction Contracts (Security of Payments) Regulations* (“the Regulations”); and
- Part 4 of the *Community Justice Centre Act*.

3. When does the legislation commence operation?

The date of commencement of all but one section of the Act was 1 July 2005.

The provision¹ in the Act dealing with the repeal of the *Workmen’s Liens Act* commenced on 1 August 2006 .

The date of commencement of the *Community Justice Centre Act 2005* was 22 February 2006.

4. Where can electronic copies of the Act and Regulations be found?

Copies of the Act and Regulations can be found at:

<http://www.nt.gov.au/dcm/legislation/current.shtml>

¹ s.66

5. Who is administering the legislation?

Minister: The Minister for Justice and Attorney-General

Agency: Department of Justice, Policy Division, Legal Services

Registrar: Mr Guy Riley

Mr Riley can be contacted on:

Tel: 08 8924 7608

Fax: 08 8924 7937

Email: guy.riley@nt.gov.au

This administrative arrangement is likely to be reviewed in the six to twelve months following the implementation of this Act and associated construction industry reforms made by the *Construction Industry Long Service Leave and Benefits Act, Building Amendment Act 2004* and the *Building Amendment Act 2005*.

6. Can the legislation be avoided?

No, s.10 of the Act prohibits any attempt to exclude, modify or restrict the operation of the Act.

However, this prohibition should be read having regard to the way in which the provisions of the Act actually operate.

For example, the legislation provides for implied provisions (see question 18) to be read into contracts in certain circumstances. Section 10 does not operate so as to prohibit contractual provisions which seek to displace the implied conditions.

If a claim is made under the Act, it cannot be avoided by the recipient of the claim. However, the claimant is not compelled to make their claim under the Act. They are free to bring their claim in a Court². Similarly, any party dissatisfied with a determination made under the Act, can still reargue the claim in Court, but pending the outcome of any Court hearing, determinations made under the Act ordering that monies be paid, are not affected and can be enforced in the same way as a judgement of a Court³.

7. Does the Act bind the Crown?

Yes, the Act binds the Northern Territory Crown and all Northern Territory agencies established by or under Northern Territory legislation.

² see s.47

³ see s.45(10)

The Act also attempts to apply to all other emanations of the Crown (eg State Government agencies and Commonwealth Government agencies). However, whether or not such other agencies of the Crown are in fact bound will depend, in many cases, on the nature of their activities and the legislation under which they operate.

The Department of Justice will contact the relevant Commonwealth agencies for the purpose of seeking to identify the Commonwealth's policy and legal positions regarding the application of the legislation to Commonwealth contracts, including sub contracts arising from such Commonwealth contracts.

QUESTIONS ABOUT TRANSITIONAL MATTERS

8. Will the Act apply to contracts in place prior to the date of commencement?

No.

The legislation only applies to construction contracts entered into after the commencement on 1 July 2005 of s.9 of the Act⁴.

However, the fact that a head contract was entered into prior to 1 July 2005 will not affect the fact that subcontracts entered into after 30 June 2005 in respect of that contract being subject to the Act.

It is understood that there may be some complications arising from this if, for example, a pre July 2005 head contract contains a prohibited clause which binds the head contractor but which that head contractor cannot pass onto subcontractors under post June 2005 subcontracts. These issues will be reviewed if and when there are any serious problems.

9. What is the effect of the Act not applying to pre-commencement contracts?

There are two main effects. They are:

- the dispute resolution provisions will not apply to disputes arising from such contracts even if the dispute commences after 1 July 2005; and
- the default contractual provisions will not apply – that is, the implied provisions will not be read into such contracts nor will the illegal contractual provisions be read out of such contracts; and
- the repeal of the *Workmen's Liens Act* (see answer to question 52).

⁴ s. 9(1)

10. What will be the immediate effect of the Act on 1 July 2005?

The immediate effect of the Act will stem from the operation of Part 2 of the Act which deals with:

- prohibited contractual provisions (see question 16); and
- the implied contractual provisions (see question 18).

It is not expected that the dispute resolution provisions will be utilised until sometime later in 2005 – i.e. it will take time for disputes arising from post 30 June 2005 contracts to materialise.

QUESTIONS ABOUT CONTRACTUAL MATTERS

11. What kinds of contracts are subject to the legislation?

- the legislation regulates “construction contracts”;
- a construction contract is an agreement (whether or not in writing) relating to the carrying out of construction work;
- the main construction work covered is that relating to civil works⁵ but it also includes other works such as reclaiming land, installing and removing equipment, various preparatory works and other works as may be set out in the Regulations;

For the purposes of this provision “Civil works” include all things that plainly come within the ordinary meaning of that term (e.g. building works) plus other works such as roads, railways, canals, pipelines, pavements and retaining walls; and

- additional to agreements relating to “construction work” a “construction contract” also covers the supply of goods and services to a construction site and other supplies of professionals’ services such as those of architects, engineers, quantity surveyors, surveyors and project management⁶.

12. Does the legislation apply to the provision of legal, accounting and or financial services?

No⁷.

⁵ s. 6(1)(c)

⁶ For the full list, see s.7(2)(a)

⁷ s.7(2)(a)

13. Does the legislation apply to residential construction works?

Yes.

14. Does the legislation mean that construction contracts must be in writing?

No.

However, in the absence of a written agreement or an inadequate written agreement, the legislation will imply provisions as being applicable to the parties to the construction contract (see question 18). The main effect of this will be that parties will no longer be able to make oral contracts that do not comply with the matters prescribed in the Act.

15. What should members of the construction industries and their clients do with their contractual arrangements when the legislation commences?

This issue relates to what parties proposing to enter into a construction contract after 30 June 2005 should consider. In this situation:

- new contracts should be examined to see if they contain any prohibited clauses. Such clauses will have no effect if they are in contracts entered into from 1 July 2005. See questions 16 and 17;
- new contracts should be examined to see if they cover the matters implied by sections 16-24. Ideally parties should make an assessment as to whether they want the implied provisions or some other provisions. See answer to question 19; and
- decide whether the contract should provide for the appointment of a registered adjudicator (see question 35) or for a prescribed appointer (see question 30) or for the matter to be left silent.

16. What are the prohibited clauses?

Only two types of clauses are prohibited. They are clauses dealing with:

- “paid if pay and pay when paid” clauses; and
- payments after 50 days.

Additionally, Regulations may be made providing for other illegal provisions. Currently, no such Regulations are proposed.

17. What is the effect of this ban on prohibited clauses?

The main intended effect is that the prohibited clauses have no effect. That is, the parties cannot rely on them. Ideally, contracts should not physically contain such clauses.

18. What are the implied clauses?

The legislation seeks to ensure that all new construction arrangements are subject to a comprehensive set of contractual provisions.

One of the mechanisms for achieving that objective is that the Act prescribes some implied contractual provisions. These will only apply (for each of nine subject areas) if there is no written provision in a construction contract that covers the subject area⁸.

If there is written contractual coverage of one or more of the subject areas, the implied terms for that subject area do not apply.

The nine subject areas are as follows – provisions dealing with:

- variations;
- the entitlement to be paid;
- claims for progress payments;
- claims for payment;
- responses to claims;
- interest on outstanding payments;
- ownership of goods;
- ‘unfixed goods’ on insolvency; and
- retention money.

19. How can an ‘implied term’ be displaced?

By including a written term covering the same subject matter as the implied term. It would be wise to ensure that all displacement provisions and (indeed) all of the implied terms, read sensibly with the other written provisions.

⁸ ss. 16-25, read with Divisions 1-9 of the Schedule to the Act

QUESTIONS DEALING WITH DISPUTES

20. What is the general nature of the dispute resolution provisions?

The critical objective of the legislation is to provide speedy dispute resolution by competent adjudicators.

The focus of any adjudication will be that of the adjudicator making a decision on the merits of the case. This is so because of necessity arising from the very tight deadlines for lodging of documents and decision making.

In other words, the adjudicators will not have the time, nor do they have the role, of engaging in other alternate dispute resolution mechanisms such as mediation or conciliation.

Anecdotal evidence from other jurisdictions indicates that the time constraints and concerns about affording natural justice to all parties, means that many adjudicators make their determinations upon the application for adjudication, the response and supporting paperwork, without conducting site inspections, obtaining expert reports, or interviewing the parties and other witnesses.

The main elements of this process are:

- provide any party to a contract the right to apply to have a dispute adjudicated;
- provide that the right to apply must be exercised within a set time (28 days) of the dispute arising;
- provide for a third party to appoint the adjudicator if the parties do not agree;
- an adjudication;
- for parallel (or subsequent) legal proceedings;
- for the enforcement, through the Courts, of the outcomes of adjudications;
- for the role of the Courts to be limited to actions based on formal litigation. That is, a party not happy with an adjudicator's decision may commence litigation;
- however, this litigation is not part of the adjudication process under the Act, nor can it interfere with the adjudication process and the enforcement of outcomes from it; and

- what litigation may do, at the end of the day, is to provide for a different set of outcomes as between the parties. However, this may occur long after the construction works required under the contract are completed.

21. What are the critical timelines (summary form)?

- Once a dispute arises the claimant has 90 days from the date of the dispute to apply for adjudication.
- The respondent then has ten working days to serve a written response.
- If an adjudicator cannot be agreed upon, any relevant prescribed appointer will have five working days to appoint an adjudicator.
- Five days to object to the appointed person is permitted by either side otherwise the adjudication will proceed.
- The adjudicator has 10 days to make a decision. This period runs from the earlier of the day of receiving a response or (in the absence of such a response) 10 days from the time when that response could have been received.
- Once the adjudication process is finalised and if a party refuses to pay the determined amount, the other party may serve notice three days in advance that the serving party's obligations under the contract are suspended⁹. This provision only applies where the contractor is the party in whose favour a determination has been made.

22. In what circumstances can the parties to a dispute agree to the dispute being resolved in a longer time than that which is set out in the legislation?

The legislation imposes a series of time obligations. Failure to comply with any time obligation leaves open the possibility that the dispute resolution process has been taken outside of the scope of the legislation. Accordingly, any such 'breach' leaves the outcomes open to attack by the other party.

Except as set out below in respect of the time for determinations, there is no formal power for the parties to agree to waive time lines or for any adjudicator to agree to any waiver. Accordingly, it is critical that there be compliance with the time limits.

If there is a failure to comply with a time limit, parties will need to carefully consider the implications. In this general *Question & Answer* guide it is not possible to explore all of the possible factual situations and provide general information or advice.

⁹ see s.44

However, one common practical situation will be that where the best qualified adjudicator is simply unavailable at a particular point in time. In that case, and similar kinds of matters, the adjudicator may, with the consent of the Registrar, extend the time by which a determination can be made by the adjudicator.¹⁰

23. Who can be a party to a dispute?

Any party to construction contract can apply to have a “payment dispute” adjudicated under the legislation¹¹.

24. What kinds of disputes are covered by the Act – i.e. what is a “payment dispute”?

A dispute can only be adjudicated under the Act if it is a “payment dispute¹²”.

The following are the payment disputes covered by the Act:

- first, disputes over amounts claimed in a “payment claim¹³”;
 - (1) A “payment claim” may be made by a contractor to a principal in relation to the performance by the contractor of the contractor’s obligations under the contract;¹⁴ and
 - (2) A “payment claim” may be made by a principal concerning the performance or non performance by the contractor of the contractor’s obligations under the Act;¹⁵
- second, disputes over amounts retained under the contract by one or other of the parties¹⁶; and
- third, disputes over the return or non return of a security¹⁷.

25. Can claims be made for damages?

It is clear, from the material in the answer to question 24, that the adjudication proceedings are not limited to claims by contractors or subcontractors for outstanding amounts due for construction work.

The Act is worded so that it seems to cover claims for damages.

¹⁰ s.33(1), s. 34(3)(a)

¹¹ s.28(1).

¹² s.8 – which contains the definition of “payment dispute”.

¹³ s.8(a)

¹⁴ s.4, definition of “payment claim”, paragraph (a)

¹⁵ s.4, definition of “payment claim”, paragraph (b)

¹⁶ s. 8(b)

¹⁷ s. 8(c)

26. How does the adjudicator make decisions on the facts?

In essence, the adjudicator will rely on evidence presented by the parties to the dispute. However, the adjudicator can, as set out in s.34(2), carry out personal inspections, arrange for expert advice or call on the parties to provide further evidence.

It is hoped for small scale disputes (e.g. over the quality of finishes), that the adjudicator would be chosen having regard to his or her capability to make a judgment based on personal inspection.

27. Does the Act allow recovery of payment for defective work?

In carrying out an adjudication, an adjudicator can deal with claims that a payment is not due because of defective work.

However, once a payment is made (and accepted as being correct), there are great doubts as to whether the Act will apply (e.g. if some time later the work is revealed as being defective).

If a contractor or principal ever finds themselves in this position, it is strongly suggested that they seek legal advice. It may be the case, arising out of similar provisions in other jurisdictions, that there is some case law that deals with the issue.

28. What should a person do if they wish to make a claim?

Section 28(2)(a) provides that the contents of an application for adjudication are to be prescribed. The Regulations provide that the application needs to contain the names and contact details of the adjudicator, the applicant and the respondent¹⁸.

The application must also comply with section 28(2)(b) of the Act.

29. What should a person do if they wish to respond to a claim?

Section 29(2)(a) provides that the contents of a response to an application for adjudication must be in accordance with the requirements set out in the Regulations. The information must be that:

- required by section 29(2)(a);
- the name of the adjudicator or the prescribed appointer;
- the name and contact details¹⁹ of the applicant; and
- the name and contact details of each other party to the contract.

¹⁸ See Regulation 6.

¹⁹ For 'contact details' see Regulation 4

QUESTIONS ABOUT PRESCRIBED APPOINTERS

30. What are the functions of the 'Prescribed appointers'?

Prescribed appointers are persons or organisations with the role of determining which 'registered adjudicator' is to be appointed to adjudicate any particular dispute.

In order for a person or organisation to be a prescribed appointer, they must be identified as such in the Regulations²⁰. See question 32 about who are the current prescribed appointers.

The role of the prescribed appointer is to appoint an adjudicator under section 30.

A prescribed appointer will have this role in any of the following situations:

- when the parties to the contract have together appointed the prescribed appointer to perform this role;²¹ or
- if there is no agreement, on the application or any one of the parties²².

It is anticipated that in fulfilling this role, the appointer will identify the issues raised by the application and choose an adjudicator with the appropriate professional qualification and expertise. The appointer will need to ascertain if the adjudicator chosen is available to take on the adjudication, and whether they may have a conflict of interest.

The hourly rate charged by adjudicators is also likely to be a factor taken into account by an appointer when making an appointment.

31. Must a prescribed appointer make an appointment of an adjudicator?

No.

The legislation empowers the prescribed appointer to appoint registered adjudicators. However, it imposes no duty on them to make such an appointment.

Whether or not, in any particular case, the prescribed appointer takes on the role will be a matter for the prescribed appointer. The decision will be affected by issues such as:

- payment (prescribed appointers may charge fees for their services); and

²⁰ S.4, definition of 'prescribed appointer'

²¹ s. 28(1)(c)(ii)

²² s.28(1)(c)(iii)

- scope of role (eg the dispute in question may be outside the scope of expertise of the prescribed appointer such that they may not feel that they have the skill or experience to make an appropriate appointment).

Any party to a contract intending to include a prescribed appointer clause in a contract should contact the proposed prescribed appointer for the purpose of making sure that the prescribed appointer is willing to perform the various functions set out in the Act.

32. What persons and organisation are ‘prescribed appointers’?

The Regulations prescribe bodies as ‘prescribed appointers’. In looking at this list in the Regulations it should be noted that bodies may be added or removed from the list. At the time of the making of the regulation some of the prescribed bodies were uncertain about whether they wished to be prescribed.

Currently, the following bodies are prescribed appointers:

- The Royal Australian Institute of Architects;
- Housing Industry Association Limited;
- Contractor Accreditation Limited;
- The Institution of Engineers, Australia (note that Engineers Australia has requested that it be removed from this list);
- Law Society Northern Territory;
- The Institute of Arbitrators & Mediators of Australia;
- Australian Institute of Quantity Surveyors; and
- Territory Construction Association Limited.

Given the Engineers Australia has indicated that it does not wish to perform the prescribed appointer role, the Institution of Engineers, Australia should not be specified in a contract as being a prescribed appointer.

33. How does the Act operate where a contract does not provide for “prescribed appointers”?

In this case, either party can chose a prescribed appointer.²³

²³ s. 28(1)(c)

34. Is it mandatory that a prescribed appointer appoint one of its own members to be the registered adjudicator?

No. It is hoped that prescribed appointers will not adopt a roster process in making appointments.

Instead, it is expected that a prescribed appointer, in making a decision to appoint an adjudicator, will take account of the nature of a dispute and appoint a person suited to the dispute. Thus, if the dispute is over paint spots, the adjudicator probably should be a skilled tradesperson. If the dispute relates to a legal interpretation, then the adjudicator probably should be a lawyer and so on for engineering, quantity surveying and architectural matters.

The list of registered adjudicators will be a public document.²⁴ Thus all prescribed appointers will know who is available.

The Department of Justice proposes to form a reference group of the prescribed appointers so as to facilitate a degree of uniformity in the appointment process.

QUESTIONS ABOUT REGISTERED ADJUDICATORS

35 What are the functions of registered adjudicators?

A registered adjudicator has the function of adjudicating disputes. As mentioned in question 20, the strong focus of the role is coming to a fast, competently made, decision on the merits of the case. The adjudicator will not have the time, or the role, of engaging in other alternate dispute resolution mechanisms such as conciliation and mediation.

36. Do registered adjudicators enjoy a monopoly in respect of dispute resolution involving construction contracts?

No.

This is because the Act only provides a mechanism for dispute resolutions. The parties could agree to some other mechanism (such as formal arbitration, the Courts, mediation or conciliation).

However, within the boundaries of the legislation, only registered adjudicators can make decisions that are effective for the purposes of the enforcement mechanisms in place under the legislation.

²⁴ see s.52(6)

37. Can a registered adjudicator refuse to consider an application?

Yes. An adjudicator may dismiss an application. This can occur:

- if it is not a construction contract;
- if it is out of time or the proper procedures have not been followed;
- if a Court or arbitrator has made a judgment, order or other finding about the dispute before the adjudicator; or
- if the adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or because the time allowed, or any extension of it, is insufficient for any other reason.

38. How does a person become a registered adjudicator?

A person who wishes to become a registered adjudicator needs to apply to the Registrar for registration under s.52 of the Act. See:

- question 5 for the Registrar's contact details; and
- question 39 for the requirements for registration.

There is no prescribed application form. However, the Registrar will supply the form that must be completed in order for the Registrar to be able to make a decision concerning registration.

Anyone registered as an adjudicator in Western Australia or Queensland (or any other State or Territory that introduces a system of registration for construction contract dispute adjudicators) is entitled to seek to registration as an adjudicator in the Territory under mutual recognition principles.

39. What are the qualifications for being a registered adjudicator?

The qualifications, requirements and restrictions concerning registration are as follows:

Legal Status

- only a natural person may be registered. The application can be made by that person or by a nominating body;

Fee

- a fee of \$100 must be paid;

Criminal history check

- applicants must authorize the Commissioner of Police to release to the Registrar the applicant's criminal history (if any)²⁵;

Formal qualifications

an applicant must have one or other of the following:

- a degree from a university or other tertiary institution in Australia in any of the courses of architecture, building, building surveying, construction, engineering, law, project management or quantity surveying; or
- have an equivalent qualification for a place outside of Australia; or
- be eligible for membership of one or other of The Royal Australian Institute of Architects, The Institution of Engineers, Australia (known as "Engineers Australia), Law Society Northern Territory, The Institute of Arbitrators & Mediators of Australia; Australian Institute of Quantity Surveyors; Australian Institute of Building, Australian Institute of Building Surveyors, Australian Institute of Project Management; or
- be registered under the *Building Act* in the category of building contractor²⁶.

Experience qualifications

In addition to the formal qualifications an applicant must also:

- have successfully completed a course that, in the opinion of the Registrar, qualifies the applicant to be an adjudicator; and
- have five years experience in one or other of the following:
 - (i) 'administering' construction contracts; or
 - (ii) dispute resolution relating to construction contracts.

Fit and proper qualities

A person is disqualified from being registered if they are one or other of the following:

- an undischarged bankrupt;
- a person who has applied to take the benefit of the law for the relief of bankruptcy or insolvency;

²⁵ See regulation 12(b)

²⁶ This registration category will come into existence on the commencement of s.12 (new sections 24A-24H) of the *Building Amendment Act 2004*

- a person who has compounded with creditors or made an assignment of remuneration for the benefit of creditors;
- a person who is disqualified²⁷ under a law of a State or Territory from following one other of the professions referred to in regulation 11(3)(a)²⁸; or
- the subject of a criminal history check that reveals information that may cause the Registrar to consider that the applicant is unsuitable to conduct adjudications.

Additionally, it is noted that the *Mutual Recognition Act* operates so that individuals licensed or registered under an equivalent interstate scheme are entitled to be registered in the Northern Territory²⁹.

40. Is a registration decision of the Registrar subject to review or appeal?

Yes, the Local Court may review the decision of the Registrar³⁰.

41. Are there controls on the fees that may be charged by adjudicators?

No.

Sections 46(1)(a)(i) and 55(3) provide that the Regulations can set a maximum remuneration rate for adjudicators. The parties to a dispute are free to agree to a rate of remuneration for the adjudicator but that rate must not exceed a maximum rate prescribed in the Regulations. No such maximum fees have been prescribed.

42. Is there a licensing fee for registration of adjudicators?

Yes, a once off fee of \$100 is payable – see question 39³¹.

43. How long does registration last?

At present, there is no period fixed. The Registrar may, however, cancel a registration if a person ceases to be eligible or if the person misconducts a hearing or is incompetent or unsuitable to conduct adjudications.

It is likely that consideration will be given to introducing a fixed period.

²⁷ “disqualified” would include persons suspended

²⁸ that is, the professions of architecture, building, building surveying, construction, engineering, law, project management or quantity surveying

²⁹ see Part 3 *Mutual Recognition Act 1992* (Cwth)

³⁰ s. 53

³¹ s. 52(3), regulation 13.

44. Is there a mandatory practice and procedure to be followed by appointed adjudicators?

No.

Section 34(6) of the Act provides that Regulations may be made dealing with the procedures to be followed by adjudicators. In the absence of such Regulations, the procedures to be followed will be those that, subject to the Act, are determined by the adjudicator.

At this time no such procedures have been prescribed. However, the Department of Justice intends to establish a reference group of registered adjudicators, the Registrar, and the prescribed appointers for the purpose of developing standards to apply in respect of both the processes of conducting adjudications and the writing of the adjudicators' decisions.

DECISIONS OF ADJUDICATORS

45. What information will be contained in an adjudicator's determination?

Section 38(1)(b) of the Act provides that the information required in an adjudicator's determination must accord with the requirements of the Regulations.

The determination must contain the names and contact details of the appointed adjudicator, the applicant and the respondent, and must:

- be in writing;
- state the amount to be paid or security to be returned;
- the dates for either of these requirements;
- the reasons for the decision; and
- identify any information that must not be published by the Registrar in accordance with s.54.

46. What are the requirements for publication of the decisions of an adjudicator?

- on making the written decision in the form required by s.38, the adjudicator must provide a copy of the decision³² to the parties and to the Registrar;
- the Registrar must make available for public inspection at no charge the result or a report of the decisions of the registered adjudicators;

³² see s.54 and 38(1)(e)

- however, the documents made available for public inspection must not include the identities of the parties or any other information that owing to its confidential nature is not suitable for publication³³; and
- accordingly, the Registrar, prior to publishing decisions, will remove identifying details and other confidential information.

47. What safeguards are there to maintain confidentiality?

As mentioned in the answer to question 46, there is a duty to delete identifying information as well as information that the adjudicator has ordered not to be published.

ENFORCEMENT OF DECISIONS MADE BY REGISTERED ADJUDICATORS?

48. What is the general nature of the enforcement regime?

In general terms, decisions of adjudicators will operate in much the same way as judgments of a Court. At the end of the day, if a party does not comply with a decision, action will need to be taken through the Courts.

The successful party to an adjudication application needs to have an original copy of their determination certified by the Registrar and then file that copy in the Court.³⁴ They can then proceed to enforce the determination as though it was a judgment of that Court

49. Is interest payable on outstanding amounts?

Yes.

Sections 35(1)(b) and 41(2) and clause 7 of the Schedule (containing the implied provisions) provide for the Regulations to set an interest rate both in respect of monies claimed for the period up to a determination, and in respect of determination amounts where they are not paid on or before the date fixed in the determination.

The Regulations provide that the interest rate (for these various provisions) is that which is from time to time prescribed in the *Supreme Court Rules* for the purposes of section 85 of the *Supreme Court Act*.

Currently that interest rate is 10.5%³⁵. See also question 50.

³³ see s.54 and 38(1)(e)

³⁴ See s. 45

³⁵ By Supreme Court Regulations 61/02 s7 gazetted on 18.12.02 – interest rate now at the rate per annum specified in rule 35.08 of the Federal Court Rules as in force from time to time.

50. How does the obligation to pay interest under the Act interact with the obligation to pay interest under the contract.

The answer to this will depend on the contract. However, interest cannot be paid on interest.³⁶ Thus, if the contract permits interest to be paid and the adjudicator makes a determination as to amount payable then additional interest will not be payable on that amount. The interest specified in the regulations (question 49) is really only of relevance if for some reason the contract does not provide for interest.

51. In what circumstances can work be suspended by a contractor under the legislation?

A contractor may, if a principal does pay an amount determined by an adjudicator as being payable, suspend the performance of the contractor's work³⁷.

This suspension cannot occur until after the contractor has given, at least three days prior to the proposed suspension, the prescribed notice to the principal.

The information that must be provided in the notice is that required by section 44 and includes the name of the adjudicator, the name and contact details of the principal, the contractor, the name and identification of the determination, the amount (if any) to be paid and the date by which such an amount must be paid³⁸.

CONTINUING OPERATION OF THE WORKMEN'S LIENS ACT

52. What is the effect of the Act on the workmen's liens legislation?

The *Workmen's Liens Act* permitted a person who has supplied goods and services to lodge a lien against the title to the land that has benefited from the supply of the goods or services.

Such a lien operates to prevent dealings with the land. There are procedures set out in the *Workmen's Liens Act* and the *Land Title Act* for the removal of liens. In essence they can be removed if relevant legal action has not commenced or if the respondent has paid the claimed money to the Registrar-General pending the outcome of proceedings.

³⁶ S. 35(2)

³⁷ s.44

³⁸ Regulation 10

The Act repealed the *Workmen's Liens Act* on 1 August 2006 but has preserved its application to any contracts entered into before that date that may still be in force³⁹.

COSTS

53. Who is responsible for the costs payable to the adjudicator?

The adjudicator is entitled to payments by the parties to the adjudication. See question 55 concerning small disputes.

The general principles are:

- the parties involved in a dispute are jointly and severally liable to pay the costs of an adjudication⁴⁰. This means that if one party becomes unable to pay its share of the costs (eg on becoming bankrupt), then the other party may be liable for all of the adjudicator's costs;
- as between themselves the parties are liable to pay the costs in equal shares⁴¹; and
- however, an adjudicator may order a party to pay costs of adjudication that are incurred because the party is frivolous or vexatious or has made unfounded submissions⁴².

In general terms it is expected that the registered adjudicator will reach agreement with parties before commencing the adjudication. The adjudicator may require that the parties provide security for costs.⁴³ However, as with the provision of all professional services, adjudicators may need to make their own judgments about the capacity of parties to pay prior to accepting an adjudication role.

54. How are the adjudicator's costs determined?

Adjudicators are required to publish their maximum rates of remuneration.⁴⁴ They make this decision about the determination of their own rate. In the absence of agreement about what amounts are payable, the amount payable will be determined in accordance with the published rate.

The rates are published on the Department of Justice website: <http://www.justice.nt.gov.au/justice/policycoord/construction/index.shtml>

³⁹ See s. 67

⁴⁰ see s. 46(4)

⁴¹ see s. 46(5)

⁴² see s. 36(2)

⁴³ see s.28(1)(d), 46(1) and 46(7)

⁴⁴ see s.55

Small disputes.

The *Community Justice Centre Act 2005* came into force on 22 February 2006. This allows for determinations of payment claims for less than \$10,000 for a fixed fee of \$500⁴⁵.

If a contractor has a payment dispute for less than \$10,000, they can serve their application for adjudication upon the Director of the Community Justice Centre, who will then act as an appointer and appoint someone to determine the dispute. The person appointed adjudicator may not be a registered adjudicator, so long as the Director is satisfied that they have qualifications and experience relating to adjudication of disputes⁴⁶.

The parties share the payment of the application fee⁴⁷.

Apart from these features, the adjudication process is governed by the Act⁴⁸.

55. Can costs be awarded in respect of the legal and other expenses incurred by the parties?

No.

THE ROLE OF THE COURTS

56. What are the roles of the Courts?

The Local Court has the following roles:

- it may hear appeals against a decision of the Registrar to make or not make a decision about the disqualification of an appointed adjudicator⁴⁹;
- it may review decisions of the Registrar to refuse to register a person as adjudicator or to cancel a person's registration⁵⁰; and
- it may review a decision of an adjudicator to dismiss an application without dealing with the merits⁵¹. See question 40.

57. Will it be possible to use the Local Court to delay the adjudication process?

As can be seen from the answer to question 57, the Court has very limited roles.

⁴⁵ see ss. 20(2) & (3) *Community Justice Centre Act 2005*

⁴⁶ see s.20(4) *Community Justice Centre Act 2005*

⁴⁷ see s.21(1) *Community Justice Centre Act 2005*

⁴⁸ see s.19 *Community Justice Centre Act 2005*

⁴⁹ see s. 31 (application for disqualification based on grounds of conflict of interest) and s. 32 (appeal)

⁵⁰ see s. 52 (application for review of Registrar's decision) and s. 53 (review)

⁵¹ see s. 33 (declining jurisdiction) and s.48 (review of the decision to decline jurisdiction)

None of these roles give the Court an extensive role in the supervision of the decision making of the adjudicators. However, once an issue is before the Court, the Court may order that any decision of the adjudicator not operate. Such an order should be made to the extent necessary for the Court to effectively hear and decide the application.

MISCELLANEOUS QUESTIONS

58. Is there to be a requirement that monies paid in respect of a subcontractors work (eg by the client) be held in trust pending the completion of the work?

No.

59. Will the parties be able to solve disputes between themselves without invoking the Act?

Yes, however, the Act sets up a range of default matters regarding the handling of disputes.

60. Does the legislation provide any protection if a principal becomes bankrupt?

No.

The Northern Territory cannot legislate for a preference to subcontractors in the event of a bankruptcy.

What the Northern Territory can do is provide some measure of protection for subcontractors who, in the normal scheme of things in the way bankruptcy proceeds are distributed, are unsecured creditors.

The Act seeks to give subcontractors an opportunity to secure payment for work done when it is done, but, if the principal or contractor making the payment goes into liquidation or bankruptcy within 6 months of making the payment, that payment will almost certainly be treated as a preferential payment, and the subcontractor will be obliged to repay the money to the liquidator or trustee in bankruptcy and will then have to lodge a claim as an unsecured creditor.

61. Does the legislation prevent a party going straight to Court?

No. However, the legislation does not prevent the other party seeking adjudication under the legislation when Courts' proceedings have been commenced.

PRECEDENTS FOR THE OPERATION OF THE LEGISLATION

62. Legislation elsewhere in Australia?

Over the past seven or eight years, legislative provisions along the lines of the Northern Territory legislation have been enacted in New South Wales, Victoria, Queensland and Western Australia.

Each succeeding Act has built on from that which proceeded it. In turn some of the original Acts have been reviewed and amended.

The Northern Territory Act is closely modelled on the Western Australian *Construction Contracts Act 2004* and *Construction Contracts Regulations*. The Western Australian scheme commenced operation on 1 January 2005.

Details of four interstate Acts are as follows:

New South Wales

Name of the Act: *Payment and Construction Industry Security of Payment Act 1999*

Name of the Administering Agency: Construction Agency Coordination Committee

Web address: <http://www.construction.nsw.gov.au/sop/index.html>

Other points:

- See Review Report May 2004 on the Payment and Construction Industry Security of Payment Act 2004.
- See monthly reports on activities under the Act including information about the costs of adjudication.

Victoria

Name of the Act: *Building and Construction Industry Security of Payment Act 2002*

Name of the Administering Agency: Building Commission

Web address: <http://www.buildingcommission.com.au>

Other points: See:

- Review of the Victorian Security of Payment Act 2002; and
- Security of Payments Brochure.

Queensland

Name of the Act: *Building and Construction Industry Payments Act 2004*

Name of the Administering Agency: Building and Construction Industry Payments Agency

Web address: <http://www.bcipa.qld.gov.au>

Other points:

- See annual and monthly reports on adjudication activities under the legislation; and
- “What You Need to Know About the Building and Construction Industry Payments Act 2004”

Western Australia

Name of the Act: *Construction Contracts Act 2004*

Name of the Administering Agency: Department of Housing and Works

Web address: http://www.dhw.wa.gov.au/330_350.asp

Other points: See:

- Report of the Construction Contracts Registrar for the year ending 30 June 2006.

QUERIES

Any further queries should be directed to the following persons:

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