

## A New Legal Risk in Construction Contracts

In December 2011, the *Building and Construction Industry Security of Payments Act 2009* ("the Act") commences.

### **Impact on Councils**

The Act grants significant additional rights to contractors/subcontractors to:

- Demand progress payments regardless of whether the contract provides for them.
- Seek an expedited determination (which could occur within 28 days) for unpaid payments without reference to the Court.
- Recover the sum due under an expedited determination as a debt.

### **Claim for Payments**

Key elements of the payment regime provided for by the Act are:

- A contractor/supplier may issue a "payment claim" to its principal/head contractor in accordance with the contract, or if there is no express provision in the contract, on a monthly basis.
- The recipient of the payment claim has 15 days to respond with a "payment schedule".
- The payment schedule must address the payment that the recipient proposes to make, and if less than the amount claimed, must set out the basis for withholding payment.
- If a payment schedule is not issued, the claimant is entitled to immediately be paid all sums claimed, and may suspend work/supplies pending payment. If court proceedings are issued to enforce the sum claimed, the recipient is not permitted to raise a defence or bring a cross-claim against the claimant in relation to these issues.
- If a payment schedule issues and does not give reasons disputing the entire claim, the claimant is entitled to immediately be paid the amounts not disputed, and may argue the balance before an adjudicator.

### **The Adjudication Process**

A claimant dissatisfied with the payment schedule may serve a Notice of Intention to Apply for Adjudication. The adjudication process has the following elements:

- The respondent can lodge a response within 5 business days of receiving application or within 2 business days of receiving notice of the adjudicator's acceptance.
- No response is allowed if a payment schedule was not provided.
- No new reasons for withholding payment can be introduced into the adjudication.
- The adjudicator is required to make a decision within 10 business days of the response.

### **Payment**

The paying party must pay within 5 days of the adjudication determination. A claim for payment can be the subject of court proceedings however in the majority of cases payment will need to be made pursuant to the adjudication prior to any determination by a Court on the issue.

### **Councils should ensure that:**

- Staff recognise when payment claims and adjudication notices issued pursuant to the Act are received.
- Procedures are put in place to ensure that the statutory timelines for responses are observed.
- All relevant matters are addressed in a payment schedule submitted in response to a payment claim.

Parties to a contract cannot be contracted out of the Act. Wallmans has prepared a "**Special Condition**" contract to rebalance the operation of the Act so far as is permissible.

We will be holding a **training session** on this Act in December, looking at the issues above in more detail and how Councils can practically deal with the procedural issues. More information will be available shortly, but if you are keen to attend please register your interest at: [marketasst@wallmans.com.au](mailto:marketasst@wallmans.com.au)

For further information on this article, please contact, Peter Watson, Senior Associate, Commercial and Property, on 8235 3010 [peter.whatson@wallmans.com.au](mailto:peter.whatson@wallmans.com.au), or Mark Sallis, Special Counsel, Commercial and Property, on 8235 3006 [mark.sallis@wallmans.com.au](mailto:mark.sallis@wallmans.com.au), or Scott Lumsden, Partner, Litigation, on 8235 3038 [scott.lumsden@wallmans.com.au](mailto:scott.lumsden@wallmans.com.au)