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5 September 2018.

Department of Finance, Services and Innovation
Regulatory Policy Branch
Email: securityofpayment2018@finance.nsw.au

Proposed amendments of the - *Building and Construction Industry Security of Payment Act 1999. (the Act)*

This submission is in response to the Department of Finance, Services and Innovation inviting comments on the draft *Building and Construction Industry Security of Payment Amendment Bill 2018*.

Introduction

I have carefully examined the proposed amendments to the Act set out in the Building and Construction Industry Security of Payment Amendment Bill 2018. In order to gauge the impact of the proposed amendments I so doing I considered how the proposed changes would have affected the Payment Claims, Payment Schedules, Adjudication Applications and Adjudication Responses that I prepared for a wide range of Contractors and Sub-Contractors over the past 15 years. And finally how the proposed changes would have affected my role as the Adjudicator of numerous payment claims since 2003.

In arriving at my conclusions I am indebted to Mr Phillip Davenport, Solicitor, owner of Expert Adjudication, who was engaged by the NSW Government to devise the original scheme that became the *Building and Construction Industry Security of Payment Act 1999* and the 2003 amendments. As the author of numerous books dealing with commercial disputes in the Construction Industry and Security of Payment Acts in Australia, founding member of the Adjudication Forum, lecturer and subsequent examiner of candidates seeking accreditation as Adjudicators, and key participant in important decisions that clarified key parts of the current Act Mr Davenport is uniquely qualified to comment on the proposed amendments.

Mr Davenport kindly provided me with a copy of his submission on the proposed amendments where he has provided well-reasoned observations based on his extensive experience of the current Act. Unlike claimants and respondents who have a vested interest in supporting amendments that will enhance their position as principal participants in the adjudication process Mr Davenport's observations and recommendations are clearly neutral and designed only to simplify the application of the Act so as to minimise the need and opportunity for future challenges to the proposed amendments. His questioning of the benefits of many of the proposed amendments both demonstrates the impartiality of his observations and provides sound reasons for rejecting those amendments that will not enhance the current Act in terms of clarity, and reducing opportunities for future legal challenges whilst preserving the Object of the Act as set out in s3 of the original and current version.

Comments

Rather than re-visit all of the observations and recommendations from Mr Davenport's submission I offer my unqualified support for that submission and express the hope that those charged with the responsibility for determining which of the proposed amendments will be accepted take careful note of Mr Davenport's recommendations.

I particularly support Mr Davenport's observations at para No's 87 – 94 entitled *Redetermination of an adjudication determination* where (in part) he notes the following:

- 91 *When an adjudicator commits a jurisdictional error or denies a party natural justice it is just as often the claimant who suffers as the respondent. All except a handful of the hundreds of cases [I know of only two] that have been brought to court to challenge the validity of the determination have been brought by respondents. The reason is that if determination is set aside, the claimant has no right to have the application redetermined by another adjudicator or the right to make another adjudication application in place of that which has been set aside.*
- 92 *What is required is an amendment that would allow a claimant to make a new adjudication application when a determination is set aside. As it is, by the time an adjudication determination is set aside, it may be too late for the claimant to make a fresh payment claim. All available reference dates may have been exhausted.*
- 93 *Often a determination is set aside on account of a jurisdictional error or denial of natural justice by the adjudicator. If a judgment is set aside in similar circumstances there is usually no bar to the plaintiff continuing with the original action or commencing another action unless the Limitation Act 1969 NSW extinguishes the right. The problem with adjudication is that the limitation period for making an adjudication application is very short [s 17(3)].*
- 94 *If it is decided to give the Supreme Court power to remit a matter, the Court should not be limited to remitting the matter to the original adjudicator [whose fault it may be that the determination is set aside]. The Court should be empowered to refer the adjudication application to an authorised nominating authority with a direction that it is to be referred to another adjudicator.*

The above observations are 100% relevant to a recent case where I prepared a \$1.9+Mill adjudication application for my client (the third application two of which were determined in my client's favour) where the adjudicator totally ignored previously determined matters and re-determined them against my client. Also, contrary to *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2011] NSWSC 818) which redefined what an adjudicator must do to make a valid determination the adjudicator failed to address the reasons provided by the claimant in support of its claim resulting in more than 30 instances of jurisdictional error and denial of natural justice.

Whilst there is little to no doubt that this totally incompetent determination would be overturned by the Court my client may be prevented from re-submitting the claim for the reasons stated by Mr Davenport. Adopting Mr Davenport's suggestions in para no's 92 & 94 above would solve this shortcoming of the current Act and ensure that the integrity of the nominated *Object of Act* at s3 is maintained.

To demonstrate that my comments represent extensive experience of the administration of engineering and building construction contracts and an in depth knowledge of the current Act I have attached my Consultant Profile as included in my website at www.hclassociates.com.au plus copy of a detailed Flow Chart of the current Act that I prepared to both assist my client's to better understand

and follow the requirements of the Act and as a teaching aid when conducting seminars for a wide range of industry organisations and major clients.

I trust that my support for Mr Davenport's observations and recommendations will receive the Review Panel's serious consideration. Should any further information be required I can be contacted on my mobile at [REDACTED]

Yours faithfully

[REDACTED]

Hank C Laan

Encl; Hank Laan. Consultant Profile
Flow chart of the Act designed by Hank Laan.

Thank you.

Yours Faithfully

HCL Associates



H C Laan

