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Public consultation draft - Building and Construction Industry Security of Payment Amendment Bill 2018

Background:

Contractors Debt Recovery commenced recoveries for construction contractors using the Security of Payment Act in 2006. Today we run Security of Payment matters nationally, and lodge about 20-25% of all NSW applications, and 12% of all those nationally. The author has personally prepared about 1,700 applications, most for the jurisdiction of New South Wales. Every day we talk to contractors and are finely attuned as to how the Act assists, or does not assist them and what can be improved. We also see the loopholes through which Respondents move in order to avoid payment or to avoid the mechanism of the Act altogether. Be in no doubt that to many, the Act is the only hope for payment. Not a month passes where we don't have people in tears on the phone. We have seen family breakdowns, and suicides. The Bill is well intentioned but some of the drafting will only make things worse. You need to get this right.

Reference dates

We wish to comment on only the proposed amendments as regards Reference Dates as set out below. This is the number one argument used by Respondent's to render an application invalid. It is also the first thing done to counter a potential claim; deny the Claimant a reference date. As noted in the Murray review, this even includes the regular terminating of contracts so as to deny a final reference date.

The thing to realise, which I am sure legislators do NOT realise, is that claims made under the Act that go to adjudication, are made often 4-9 months after the work is completed. Think about that for a moment. Because the deficiencies in the drafted amendments are felt hardest when applied to the real day-to-day experience of contractors. Claimant's do not think about the Act when they are not paid. They think about how to convince or persuade their client to pay them. This is via email or phone calls. They remain in this informal mode for months because it holds the prospect of payment without the expense of lawyers or consultants, and it appears to offer fast payment due to its informal nature. This is of course a mirage, but at the time they don't want an adversarial situation.

The take-away here is that matters that go to adjudication are overwhelmingly those where the work was completed many months prior, and the Contractor has;

1) Been paid $0.00 for their last payment
2) Been paid $0.00 for their first retention payment
3) Been underpaid on the second and third last payments.

That is, they are owed a lot of money by the time they complete. They are dying under debt. At this point any formal way forward [SOP, Court, etc] is off the radar as they cannot conceive spending a cent on it. They don't have the money.

It is only 4-8 months later, when informal avenues are exhausted, and when they have got some money coming in on the next job, that they can turn their mind to the SOP processes and return to the previous job to recover their money. Often, they have accepted a payment plan and after a few

months of payment the payments stop. Now the Contactor wants to go to adjudication for the rest but has no reference date to use!

The Act MUST provide easy and accessible reference dates to service these scenarios because they are the most common scenarios.

Section 8(2)(b): The fact that this is drafted in the way it is, tells me that the drafters are not aware of the arguments that are used to defeat claims. Here a phrase is added after the word "month": *"…in which work is carried out or the goods and services are supplied"*.

No NO NO NO NO!

Think about it. The bulk of claims are served *months after* the work is completed. Often up to 8-12 months. If the contract does not provide a reference date then it will default to 8(2)(b). The result is there will be no reference date to claim against. Because work was not carried out in any of the preceding 8 months.

Is this not obvious?
Why must this phrase be added?
Why do you look to make things complicated?

Consider a common scenario: A Contractor will complete work on May 10th under a contract that does not provide a reference date [this is about 50% of them]. There is a dispute over the final payment. The parties trade invoices, claims, emails and insults for three months. The Contractor then gets going on new work to claw back some cashflow and it is only 7 months after works that he/she can refocus on getting this money claimed. But there is no reference date is there? Only the last month "…in which work is carried out" is available. The date of May 31st was the last reference date available because that is the month work *was last carried out*. And it is all but certain that in the Claimant's attempts to get paid throughout June and July, it would have served a claim under the Act and consumed that last available reference date.

No reference date, no claim. Another contractor goes unpaid due to a pointless piece of drafting. The phrase offers no value. If you even make one change then it must be to remove this phrase at the end of s.8(2). It will destroy the use of the Act.

The other problem is that this addition cuts across s.13(4)(b): the 12-month limit. If a reference date only arises in months where work is carried out then how will this limit work? It can't. I don't think this has been thought through.

Section 8(4): There is no point having a separate reference date for a single or one-off payment. This is not adequately defined anyway. These usually arise under a contract where no reference date is agreed and so will be caught by proposed s.8(2) anyway. This will create a new reference date that the Respondent can then say has been consumed. The Respondent can argue that the 'one-off'

reference date applies whereas the Claimant will argue that the default under 8(2) applies. Why complicate this so much?

We suggest that 8(4) be omitted.

Section 8(5): This is rejected on the same grounds as above. There is no proper definition of what a Milestone payment is. And why have it? It does nothing that is not already offered by the simplicity of 8(2). Instead it will allow the respondent's lawyers the opportunity to argue that what the Claimant thought was a 'one-off' reference date was in fact a 'milestone reference date' and so the claim is invalid.

There will also be arguments as to the length of time available to make a claim. The Claimant may rely on the 12-month limit under s.13 whereas the Respondent will argue that the reference date was a milestone reference date that occurred 15 months prior and so the claim is invalid.

These silly distinctions are a feature of the Victorian Act. That Act has been rightly condemned for being onerously worded and full of distinctions and exceptions that unnecessarily complicate everything. If the aim is to have the Act function so as to assist contractors recover payments for work done, then the key is S-I-M-P-L-I-C-I-T-Y. There is no need to offer so many possible reference dates. They do not help Claimant's get paid, they help Respondents avoid payment. The more options the Act provides the more arguments you'll get. Provide less options, but give those options with a broad catchment. The simple provision for a date of the last day of each named month that arises every month for a year is all you need. Nothing more.

Section 8(6): The concept of making a termination date a reference date is a great leap forward, but as drafted will be pointless. Why? Because in the inevitable exchange of paperwork and invoices that occurs after termination, where the Contractor is insisting on payment and trying informal methods to get paid, a claim will inevitably and inadvertently be served that will consume that final reference date.

And that will be it. Unless the contractor goes directly to adjudication after termination, this change will have no effect. If anything, Respondents will ask for a final claim to be served under the pretence of making payment and then sit on its hands knowing that it has consumed the final reference date and the Claimant has no way forward. This goes on in Victoria all the time with head contractors stringing Claimant's along for the three-month period in which a claim can be made, then then cutting them off! As drafters you must assume the very worst in human nature because that is what you are dealing with.

Instead, a reference date after termination ought to arise on the day after Termination and then the end of each subsequent named month for 12 months. That will bring a swift end to the rash of terminations and also allow a Claimant to go to adjudication once it is back on its financial feet.

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The Answer?

Reference Dates should simply arise on the last day of every named month for 12 months from last work: And should do so even if the contract seeks to limit their occurrence. This is all you need.

Any claim, whether milestone, one-off, single, etc is easily accommodated by this simple provision. So that when informal discussions fail, there is an easily identifiable and accessible reference date available.

I implore you with as much vigour as I can from the printed page, you must get this part of the Act right. Get rid of the embellishments and options. Make it simple. And make a claim possible for a long time after works are done. That is when contractors go to adjudication. We field hundreds of calls a month and have done so for over a decade.

The voice of those who actually rely on the Act for their payments are often over-looked amid the groups of lawyers and consultants.

But isn't the Contractor's 'rubber-hits-the-road' experience that is the central issue here?

If it is, then the draft needs to be changed as suggested above.

Regards,

Anthony Igra
Director