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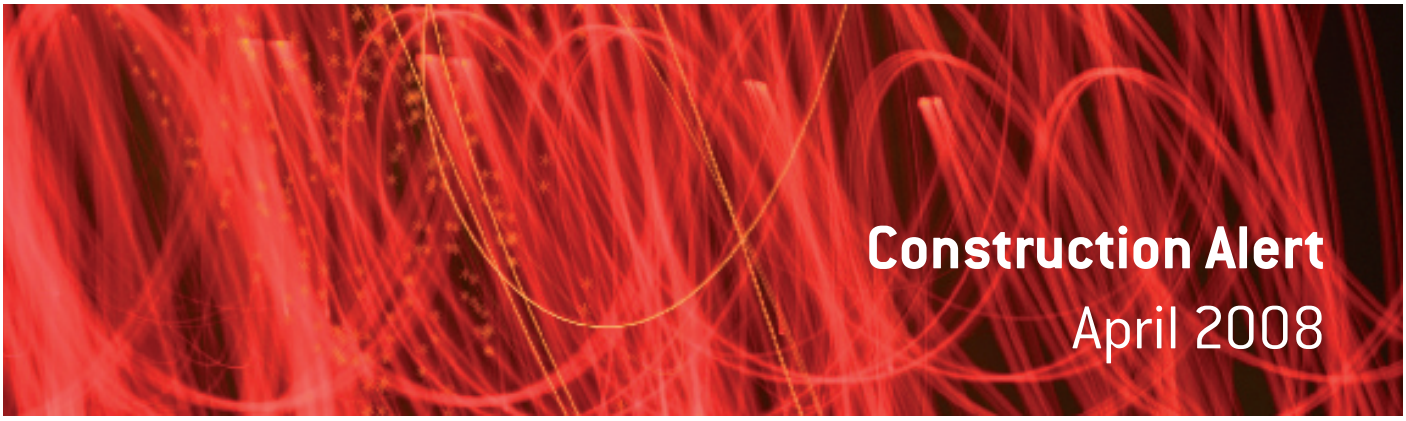

Security of Payment - Soon a National Phenomenon?

"The Security of Payment regime has been in place in NSW since 2000. It is also well established in Queensland, Victoria, Western Australia and the Northern Territory. Only South Australia, the ACT and Tasmania presently remain outside this regime."

The *Building and Construction Industry Security of Payment Act 1999 (NSW)* ("the Act") commenced in New South Wales on 26 March 2000. The Act was aimed at reforming payment behaviour in the building and construction industry by ensuring that any person who carries out construction work (or the supply of related goods and services) under a construction contract is provided with:

- a statutory right to progress payments in respect of that work without having to go to Court; and
- access to an adjudication procedure to allow for the amount of such payments to be determined on an interim basis and enforced immediately.

The Act focused on efficiency, expediency and cost effectiveness and established an expeditious method for the interim resolution of a significant class and number of contractual disputes within the construction industry, with provision for the parties to have disputes ultimately determined in accordance with ordinary Court or arbitral processes.

In South Australia, the Building and Construction Industry Security of Payment Bill ("the Bill") was introduced in September 2007, by Nick Xenophon (now a Federal Member of Parliament). The Bill adopts in large measure, the provisions of the NSW Act. The NSW Act is also the basis of the Queensland and to a lesser degree, the Victorian equivalent Acts. Western Australia and the Northern Territory have adopted their own somewhat different model.

It is encouraging to see that the Bill does not reflect recent amendments to equivalent Victorian legislation. Though the Victorian amendments brought the Victorian Act into closer alignment with current NSW legislation, other amendments significantly limited the ambit of the legislation by imposing caps on variation claims.

With the ACT now actively considering the introduction of such legislation and Tasmania having considered it some time ago, it is hoped that South Australia will follow through and enact the Bill regardless of Mr Xenophon's move to Federal politics.

The South Australian Bill has two useful and significant improvements over the NSW model.

The South Australian Enhancements

These enhancements in the Bill permit:

- an Adjudicator to apportion and assess costs where one party has engaged in "frivolous and vexatious conduct" or made "unfounded submissions"; and
- the parties to agree upon the appointment of a particular Adjudicator, rather than submit to a blind nomination by a "nominating authority".

Conversely, the Bill also includes a provision expressly permitting Judicial review of Adjudicators' determinations. The Queensland Parliament has recently seen fit to repeal a similar provision which had operated in Queensland for some years.

The Power to Award Costs of an Adjudication

Adjudication, the dispute resolution process introduced by Security of Payment legislation, is not necessarily cheap. While the process can be extremely cost effective, it is not uncommon for Adjudication Applications to involve significant quantities of paper and many pages of submissions, often prepared by lawyers and perhaps a number of consultants.

As with litigation, some Applications and Responses lack merit. Existing Security of Payment models (and indeed, the Bill) allow an Adjudicator to apportion liability for payment of the Adjudicators' fees and expenses, dependant upon the outcome.

Section 28 of the Bill permits an Adjudicator to also apportion and assess costs (as distinct from his or her "fees and expenses") where one party has engaged in "frivolous or vexatious conduct" or made "unfounded submissions".

The approach taken in the South Australian Bill is commendable and if enacted should inhibit, spurious claims and responsesmore effectively and may lead to more just outcomes.

Agreement Upon Choice of Adjudicator

Section 18(8) of the Bill permits the parties to agree upon the appointment of a particular Adjudicator and require the nominating authority to appoint the agreed Adjudicator. This is a useful

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innovation and may give the parties greater confidence in the outcome than a "blind" appointment by a nominating authority. This also allows the parties to indicate acceptance of an Adjudicator who may have already determined an earlier dispute between the parties on the same project. By definition, in those circumstances, one party has won and another lost, raising an apprehension of bias which would normally inhibit the appointment of the same Adjudicator to another dispute between the parties. Where the contract and/or the nature of the project is complex, there are often powerful reasons to try and use the Adjudicator's experience in the earlier matter. Section 18(8) recognises this possibility, and the fact that agreement as to the adjudicator may reduce subsequent dispute.

Judicial Review

The other significant difference in the Bill (from the NSW model) is the entitlement of a party to apply under Section 24 to the District Court for a declaration that an Adjudicator's determination is beyond the power conferred on the Adjudicator.

With respect, this is a backward step. A similar provision in Queensland legislation, (not found in NSW legislation) was repealed with effect from August 2007. This effectively removed an Adjudicator's determination from the ambit of the Queensland Judicial Review Act.

Security of Payment legislation has, wherever introduced, been intended to provide an expeditious mechanism for contractors to obtain an interim payment.

Allowing the losing party to legitimately appeal an Adjudicator's interim determination defeats the fundamental objective of the Act. This is the very reason why Queensland has recently repealed its equivalent provision.

In NSW, challenges to Adjudicators' determinations are governed by the principles in the NSW Court of Appeal decision of *Brodyn v Davenport [2004] NSWCA 394*. To be a valid determination the "basic and essential" requirements of the Act must be followed, the Adjudicator must afford the parties the measure of natural justice the Act permits, and the Adjudicator must make a bona fide attempt to discharge his or her obligations under the Act.

If an Adjudicator misconstrues either the Act or the Contract, the determination will generally be deemed a valid determination. The mere ten business day window afforded an Adjudicator for the completion of his or her determination makes Adjudicator error likely, but the legislation protects the losing party by making such determinations interim only.

In light of the decision in the Brodyn case - albeit a NSW Court of Appeal decision - Section 24 in the Bill is not necessary and indeed is more likely than not to frustrate the operation of the legislation if enacted. To require Adjudicators to be infallible or highly exposed to judicial review would frustrate the intention of the legislation by delaying payment while the judicial review process is exhausted.

After all, an adjudicator's decision is interim. The litigious energies of disputing claims are far better expended in the final dispute resolution processes whether by alternative dispute resolution or conventional litigation.

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