

Rethinking Construction

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Security of Payments Recent Developments

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Introduction to the Act

- The focus of this paper is to:
 - examine the recent cases relating to the security of payment in New South Wales
 - examine issues important for contractors and principals.

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A Brief History of the Act

- Prior to the enactment of the Act, major studies found that failure to pay subcontractors on time, or not at all, had a substantial impact on their capacity to survive.
- “...all too frequently...small contractors...do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families.” 2nd Reading Speech.

Object of the Act

- To ensure that a person is entitled to receive and able to recover progress payments if the person
 - (a) undertakes to carry out construction work under a construction contract
 - or
 - (b) undertakes to supply related goods and services under a construction contract(s 7))

Features of the Act

- Statutory entitlement to receive progress payments
- Right to compel payment from Principal
- Abolishes “pay-when-paid” and “pay-if-paid” clauses 16
- Statutory entitlement to suspend work
- Denies the right to contract out of the Act

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Application of the Act

- The Act applies to:
 - any construction contract, whether written or oral (s 9 schedule2)
 - “construction work” (s 10)
 - “related goods or services” (s 11)
- The Act does not apply to (s 10(3)):
 - Mining
 - Loan Agreements(s3)
 - Construction contract outside Queensland (s3(4))

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Timetable

| | |
|----------------------------------|-------------------|
| PAYMENT CLAIM | 10 days |
| PAYMENT SCHEDULE | 10 days |
| ADJUDICATION APPLICATION | 5 days |
| ADJUDICATION RESPONSE | 5 - 8 days |
| ADJUDICATOR'S CERTIFICATE | |

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Progress Payments and Progress Claims

- A person is entitled to a payment claim “on and from” the “reference date” which is:
 - the date determined by the contract; or
 - where the contract is silent, the last day of the month (s 12,9sched2).
- Amount is determined by the contract or alternatively, a “reasonable amount” (s14)
- Due date for payment is that under the contract or 10 business days from payment claim (s 15)

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Contracting out of the Act

- Any provision that arises under a construction contract, which purports to exclude, modify or restrict the operation of the Act is now void. (s 99)
- Ambit of s99 is not certain and the consequences not yet fully judicially determined

The Payment Claim

- A payment claim must:
 - identify the “construction work” or “related goods or services”;
 - indicate the amount of the progress payment due;
 - state that it is made under the Act; and
 - be served directly upon the person (rather than on a legal representative)

The Payment Claim

- No restriction on including a disputed item or “contentious” issue such as costs of delay or acceleration, damages for breach of contract, negligence or breach of the *Trade Practices Act* in practice the position still emerging but damages generally excluded
- May include more than one progress claim and related work done in period prior to the month
- Limited to one payment claim in respect of each reference date (s 17(5))

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The Payment Schedule

- If the respondent does not respond with a payment schedule within 10 days (or earlier date as specified under the construction contract) the respondent becomes liable to pay the amount claimed in payment claim (s 18(5))
- The content of the payment schedule is critical; if reasons not stated s18(3) not able to be in adjudication response (see s24(4))

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The Payment Schedule

- A payment schedule must (s 18(2)):
 - identify the payment claim;
 - indicate the amount of the payment the respondent proposes to make;
 - state (if less than the claimed amount) reasons for withholding payment (s18(3));
 - be served directly on the claimant (rather than on a legal representative)

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The Payment Schedule

- The reasons for withholding payment must be:
 - clear and unambiguous;
 - detailed to a reasonably sufficient degree to allow a claimant to decide whether to pursue a claim through to adjudication.

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The Adjudication Response

- The adjudication response:
 - may be made within 2 business days of notice from adjudicator or 5 business days of the adjudication application;
 - may contain any relevant submissions;
 - can only include the reasons already furnished in the payment schedule; and
 - must be served directly on the claimant (s 18).

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The Adjudication Process

- An adjudicator:
 - is to determine the adjudication within 10 business days (s 25(3));
 - may request further written submissions;
 - set deadlines for further submissions;
 - call a conference of the parties; and
 - carry out an inspection (s 25(4(d))).

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The Adjudicator's Determination

- The adjudicator is to determine the:
 - amount;
 - Date for payment
 - interest; (s 26(1)).
- The adjudicator is to consider the:
 - Act;
 - construction contract;
 - payment claim, payment schedule (& submissions);
 - the results of any inspection (s 26(2)(e)).

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Consequence of Determination

- If the adjudicator determines that the respondent is required to pay, the amount must be paid or secured into a designated trust account by the date
- If the respondent fails to pay, the claimant may:
 - Recover amount as a debt; or
 - serve a notice of intention to suspend the work (s 33).

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Consequences of Determination

- If the respondent commences proceedings to set aside the judgment, **s31(4)** of the Act states that the respondent cannot:
 - bring any cross-claim against the claimant;
 - raise any defence; or
 - challenge the adjudicator's determination
 - And must pay in.

Suspension

- Previously, at common law a contractor or subcontractor had no right to suspend work due to the Principal's failure to pay a progress claim.
- The Act now grants a statutory entitlement to a claimant to suspend work after 2 business days of serving a notice of intention (ss 33(1))

Challenging the Adjudicator's Determination

- “inserting into a statute yet a further adjudication appeal process between the adjudicator’s interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment.” 2nd Reading Speech NSW
- Despite this legislative intention, it is possible to challenge an adjudicator’s determination.

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Challenging the Adjudicator's Determination

- An adjudicator’s determination may now be challenged on the grounds of failure:
 - to observe essential requirements a denial of natural justice; or
 - to exercise the power bona fide
 - to give natural justice
- Brodyn CA 9-0

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Brodyn Pty Ltd t/as Time Cost & Quality v Davenport [2004]

NSWCA 394 03/11/2004

- Court of Appeal's judicial review, is no longer available
- Basic and essential requirements
- Bona fide exercise of power
- No denial of natural justice
- Possible to upset judgment only if "no" determination

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Estate Property v Barclay Mowlem [2004] NSWCA 393

03/11/2004

- Some work included in the Payment Claim must be performed in the last twelve months

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TransGrid v Siemens **[2004] NSWCA 395** 03/11/2005

- The preferable construction of the Act is that the adjudicator does not step into the shoes of the superintendent para 68

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Property & Equity **Developments v Parnell [2004]** **NSWSC 1035** 12/11/2004

- A payment claim is valid if any part of the construction work included in the payment claim is carried out in the previous twelve months

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Corbett Court v Quasar [2004]

NSWSC 1174 25/11/2004

- A tripartite agreement for payment of moneys from a financial institution is unlikely to constitute a loan agreement unless the tripartite agreement imposes an obligation on the bank to lend

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Rothmere v Quasar [2004]

NSWSC 1151 26/11/2004

- That section 22(4) is not a provision, which if not complied with by the Adjudicator, would result in a Adjudication Determination being void.

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TQM v Dasein [2004] NSWSC 1216 03/12/2004

- “receipt” is defined as “taking into one’s possession and is not the equivalent to “being served” or “having been served”
- Care should be taken to ensure that the Adjudication Application is actually received

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Barclay Mowlem v Tesrol Walsh Bay [2004] NSWSC 1232 09/12/2005

- To “provide” a payment schedule means at least that the process of delivery must be initiated by the Respondent rather than the actual receipt of the Payment Schedule by the Claimant

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Greenways Australia v CBC Management [2004]NSWSC

1186 10/12/2004

- Pursuing an offsetting claim under Commonwealth Legislation does not involve any attempt to have the District Court judgment under the Act set aside

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Hersho v Expile [2004]

NSWCA 468 13/12/2004

- The courts appear to require more than a “real risk of prejudice” to grant a stay of judgment

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Brodyn v Dasein Constructions **[2004] NSWSC 1230** 15/12/2004

- Despite the provisions of s25(4) of the Act, a Respondent may be entitled to set off a claim in separate proceedings where the Applicant is in administration or liquidation and Commonwealth Legislation prevails.

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McLaughlin's Family **Restaurant v Condukes [2004]** **NSWCA 447** 20/12/2004

- There must be more than “a real risk of prejudice” if the stay was to be granted

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Okaroo v Vos Construction **[2005] NSWSC 45** 11/02/2005

- Arrangements between parties do not need to be legally enforceable in order for claimants to exploit the Act.
- Parties should ensure all agreements are documented and informal arrangements are restricted to minor obligations.

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Coordinated Construction v J M Hargreaves [2005] NSWSC **77** 22/02/2005

- An Adjudicator's determination is not void because of the Adjudicated Amount includes an amount "for" construction work including delay damages and interest

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Falgat Constructions v Equity Australia [2005] NSWCA 49

03/03/2005

- Consecutive proceedings may be made under the Act and under the contract

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Cooper v Veghelvi [2005]

NSWSC 227 23/03/2005

- A respondent is required to pay into the court as security the unpaid portion pending the final determination of those proceedings to challenge determination

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Aldoga Aluminium v De Silva Starr [2005] NSWSC 284 01/04/2005

- That sections 14 and 15 do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside a demand under the Corporations Act, even where the dispute has not been the subject of a Payment Schedule served in accordance with the Act

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Vince Schokman v Xception Construction [2005] NSWSC 297 04/04/2005

- Option to apply for Adjudication when a payment Schedule is not given must be made strictly within the statutory timeframe

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Co-Ordinated Construction v Climatech [2005] NSWSC 312

13/04/2005

- That claims for delay damages can be the subject of payment claims under the Act, if provided for by the terms of the particular Contract between the parties

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Pacific General Securities v Soliman & Sons [2005] NSWSC

378 14/04/2005

- That in order for period for adjudication response to run the Act and the determination to be valid, the notice of acceptance must be actually received by the Respondent

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Australian Remediation Services v Earth Tech Engineering [2005] NSWSC 362 14/04/2005

- Confirms that the policy of the Act is “pay now argue later”. As such, the court is unlikely to interfere and grant an injunction unless the Adjudicator’s jurisdictional entitlement is to be clearly exceeded

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Lifestyle Retirement Projects No 2 v Parisi Homes [2005] NSWSC 411 22/04/2005

- Case confirms *Australian Remedial Services v Earth Tech Engineering* and dismisses the application for an injunction restraining any further step in the adjudication process

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Air Dynamics Control & Services Contracting v Durham **[2005] NSWSC 366** 22/04/2005

- Applicant not required to repay monies received in error from enforcement proceedings pending final decision of the Supreme Court

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Alan Conolly v Commercial Indemnity [2005]NSWSC 339 29/04/2005

- A payment Claim may be constituted by several different documents served at the same time.
- However, multiple documents may not constitute a valid Payment Claim.
- Care should be taken to ensure that form of the Payment Claim is clear

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REFORM ISSUES

- Time bars should they be extended / extendable
- Representation and costs
- Appeals for further adjudication,
- The inclusion of damages and other claims

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SUMMARY

- Act changes construction contract management practices
- Proactive protocols are essential
- Strict compliance is essential
- Risk of fatal impact on private sector is high
- The Act and judgments now present a difficult but reasonably clear theatre of operations

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