Analysis of recent amendments made to security of payment legislation in New South Wales

Michael C Brand • Philip Davenport
INTRODUCTION

• Background

• Operation of the ‘Building and Construction Industry Security of Payment Amendment Act 2010 (NSW)’

• Effect of ‘Contractors Debts Act 1997 (NSW)’

• Questions
BACKGROUND

• FORMAL REVIEW of the NSW Act in September 2010

• IDENTIFIED PROBLEM:
  – Difficulties experienced in recovering Adjudicated Amounts

• Building and Construction Industry Security of Payment Amendment Act 2010 (NSW)
  – Assented 29 November 2010: Commenced 28 February 2011
    • Applies to current and future construction contracts.
    • Applies to current and future adjudication applications.
‘Progress Claim’

10 BD + 5 BD (by notice)

‘Payment Schedule’

may elect to go to ADJUDICATION

10 BD

‘Adjudication Application’

2 BD AFTER appointment of Adjudicator
5 BD AFTER served with AA

‘Adjudication Response’

10 BD AFTER appointment of Adjudicator (extendable by agreement)

‘Adjudication Determination’

Determines:
Amount of Progress Payment
Due Date for Payment
Rate of Interest
Apportionment of Fees

Recovery - ‘Debt Certificate’
Contractors Debts Act 1997

‘Adjudication Certificate’
SOP Act
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‘Adjudication Certificate’

SOP Act

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CURRENT PROCESS
(Adjudication Option)

s.7(1A) Contractors Debts Act 1997:

“If an Adjudication Certificate has been filed as a judgment for a debt in accordance with section 25 of [SOP Act], the court may...issue a Debt Certificate in respect of the debt due under this section”.

ARRU

UNSW
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CURRENT PROCESS
(Adjudication Option)

Effect of ‘Debt Certificate’

PRINCIPAL

Head-contract

CONTRACTOR

Sub-contract

SUBCONTRACTOR

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may elect to recover statutory debt in COURT

s.14 ‘Attachment Order’
Contractors Debts Act 1997
FREEZE FUNDS in the hands of the RESPONDENT’S CLIENT

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AMENDMENT?
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FREEZE FUNDS in the hands of the RESPONDENT’S CLIENT

s.26A-F ‘PAYMENT WITHHOLDING REQUEST’

AMENDMENT !
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FREEZE FUNDS in the hands of the RESPONDENT’S CLIENT

PAYMENT WITHHOLDING REQUEST’ s.26A-F

EFFECT?
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- Determines:
  - AMOUNT OF PROGRESS PAYMENT
  - Due Date for Payment
  - Rate of Interest
  - Apportionment of Fees
- 5BD

EFFECT!
INCREASED CHANCE OF RECOVERING ADJUDICATED AMOUNT

‘PAYMENT WITHHOLDING REQUEST’ s.26A-F

s.14 ‘Attachment Order’
Contractors Debts Act 1997
FREEZE FUNDS in the hands of the RESPONDENT’S CLIENT

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KEY ELEMENTS

Principal’s obligation – $ AMOUNT

The amount stated in the Payment Withholding Request
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Obliged to retain the smallest of:

A. The CLAIMED AMOUNT ≈ $ stated in PWR
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C. The amount that is or becomes payable to the Respondent for, or incidental to, the work or materials that the Respondent engaged the Claimant to carry out or supply.
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Include Respondent’s MARK-UP??...e.g., profit & attendance
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What if ‘the work or materials’ NOT discernable? - e.g..under LS contract
### KEY ELEMENTS

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Withdrawal Notice
Amendment Regulation
NSW 2011
What if **NO possibility** of an Adjudication Determination being made?

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Principal’s liability – non-compliance with PWR

• Jointly and Severally liable with the Respondent to pay the Adjudicated Amount
  - Principal can recover as debt due from the Respondent

• Penalty
  - Introduced for the first time - To what effect?
  - Goes against the ‘Spirit’ of the Act
KEY ELEMENTS

Claim by Respondent against Principal

- Whilst statutory obligation continues to withhold money:
  - Operates as a Defence against recovery of the money by the Respondent.
AMENDMENT

What Problems May Arise?

• No preliminary review of the amount claimed:
  − *Overstated claims*: freeze cash flow to Respondents

• Potential for Abuse by Claimants:
  − May encourage *spurious claims*
  − Use Act to *leverage resolution* with Respondent
CONCLUSION

• Principals squarely in play.

• Sub-contractors direct influence over the cash flow of head-contractors - FREEZE MONEY.

• Encourage timely negotiation between disputing parties.

• The Principal may be liable to the Claimant for money owing by the Respondent.

• Principals need adequate internal mechanisms in place.

Thank you