



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

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Never Stand Still

The logo for the Adjudication Research + Reporting Unit (ARRU). It consists of a solid black square with the letters 'ARRU' in white, bold, sans-serif font centered within it.

ARRU

Adjudication Research + Reporting Unit



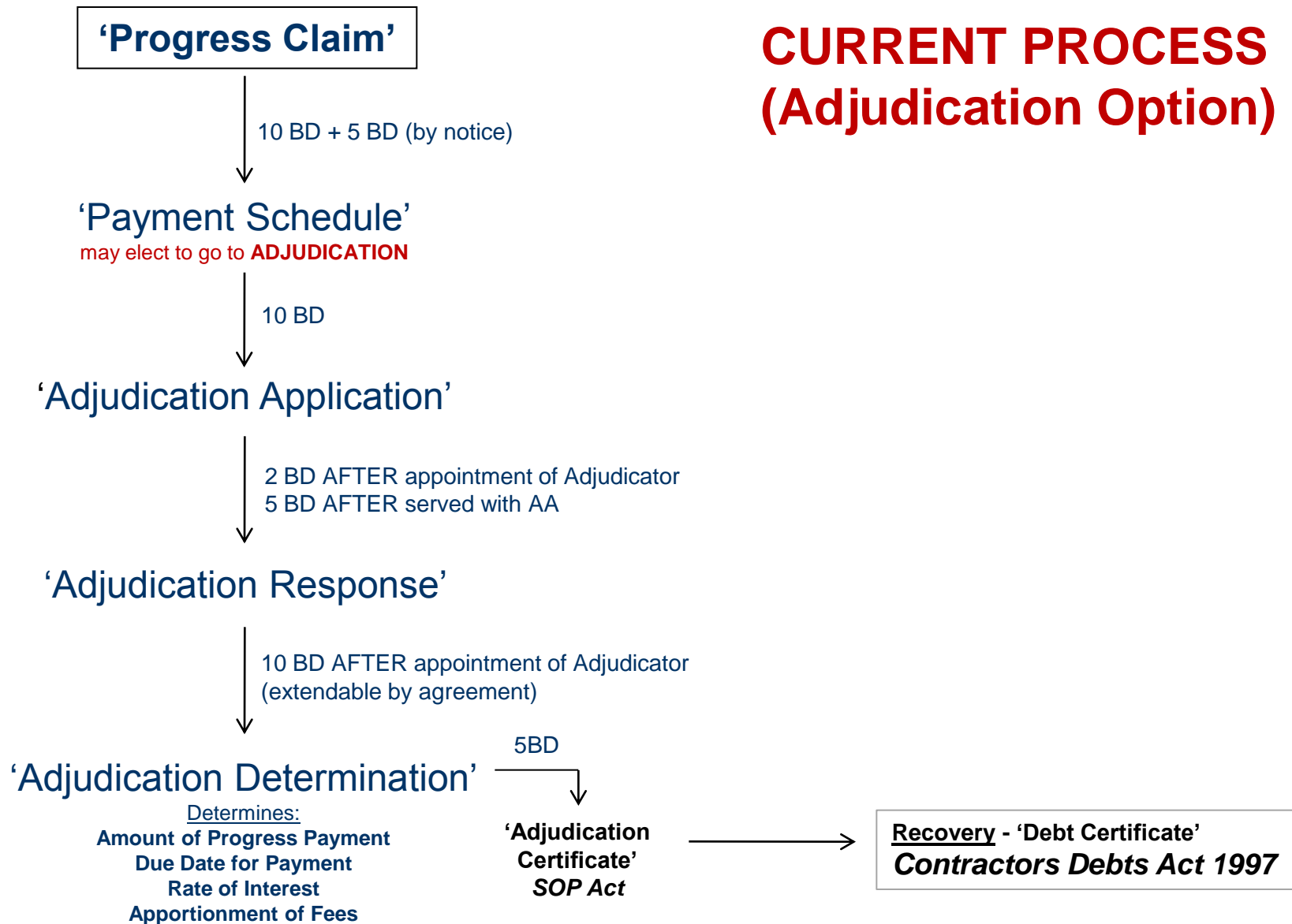
INTRODUCTION

- Background
- Operation of the 'Building and Construction Industry Security of Payment Amendment Act 2010 (NSW)'
- Effect of 'Contractors Debts Act 1997 (NSW)'
- Questions

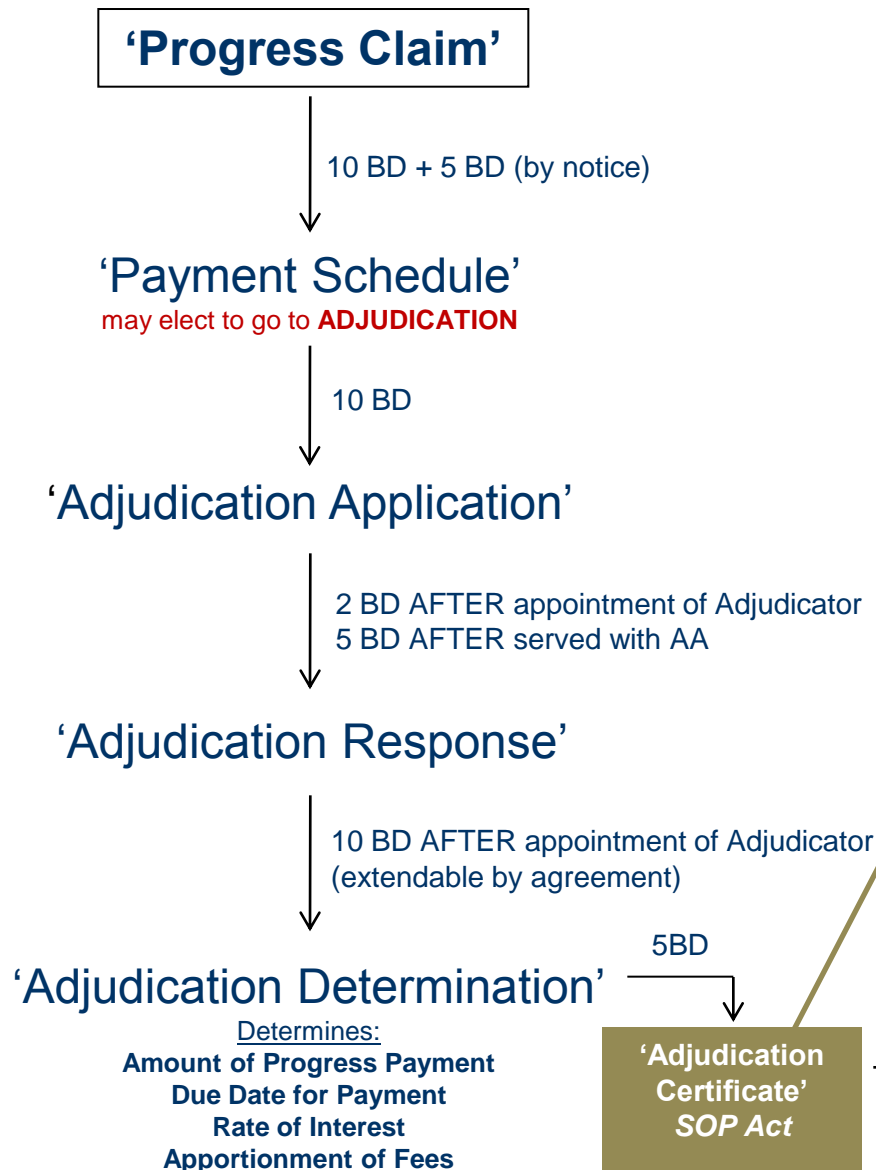
BACKGROUND

- 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.

CURRENT PROCESS (Adjudication Option)



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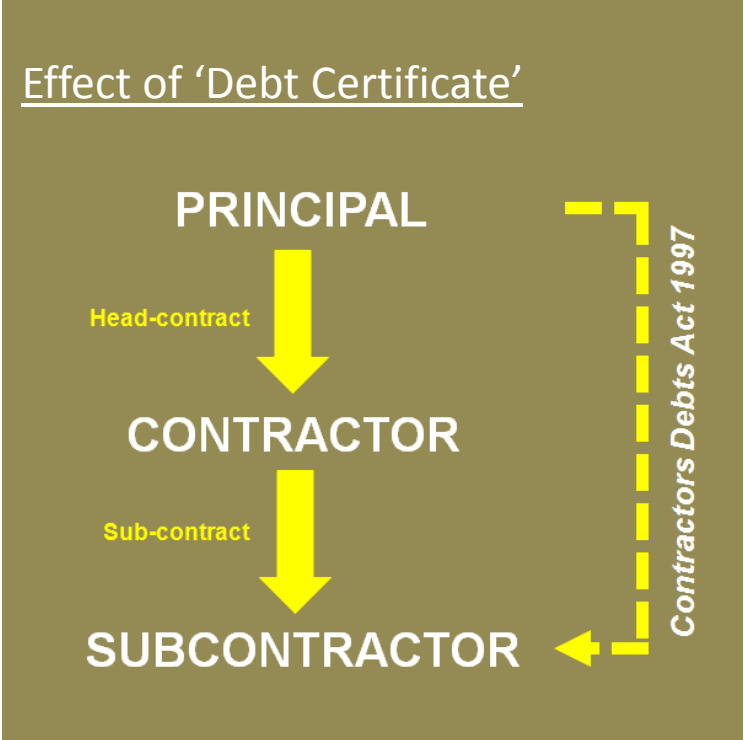
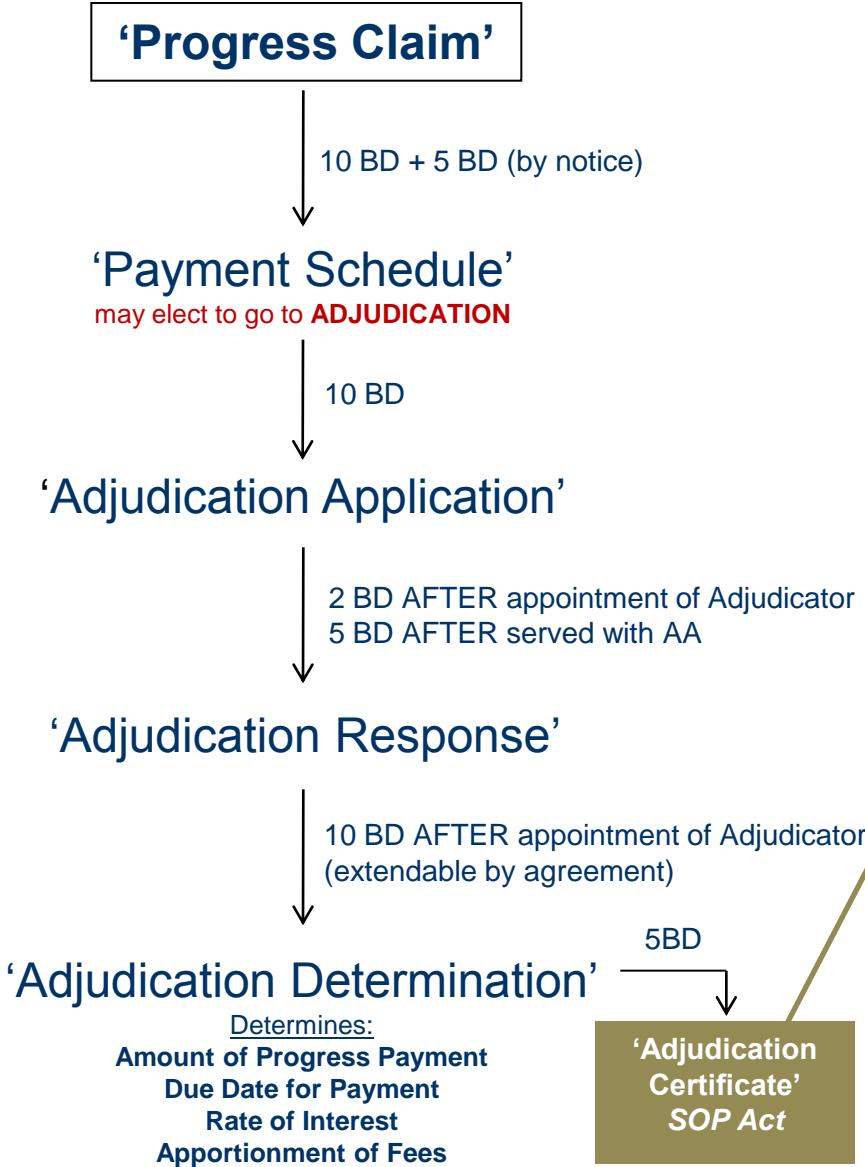


s.7(1A) *Contractors Debts Act 1997*:

“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”.

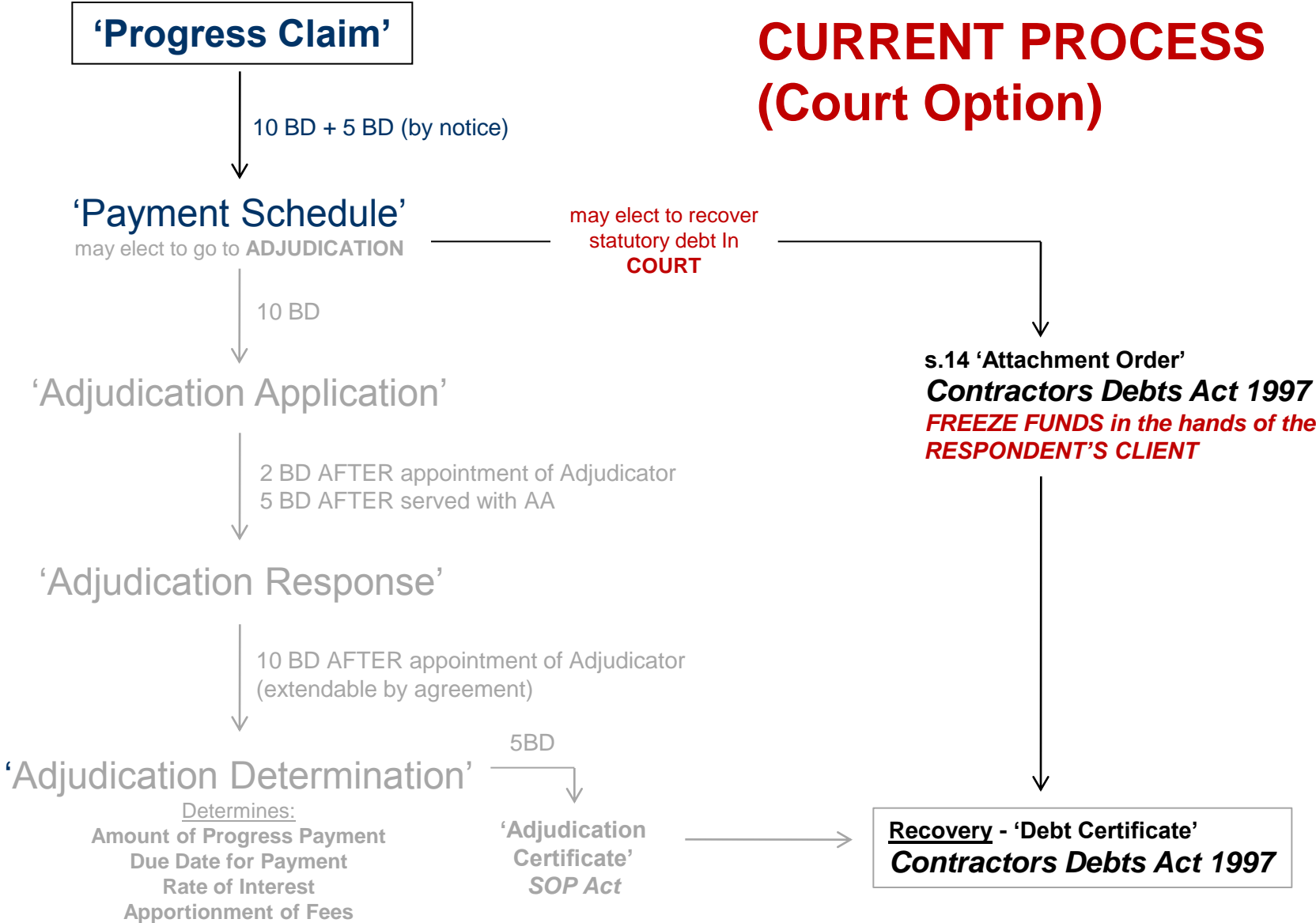
Recovery - 'Debt Certificate'
Contractors Debts Act 1997

CURRENT PROCESS (Adjudication Option)

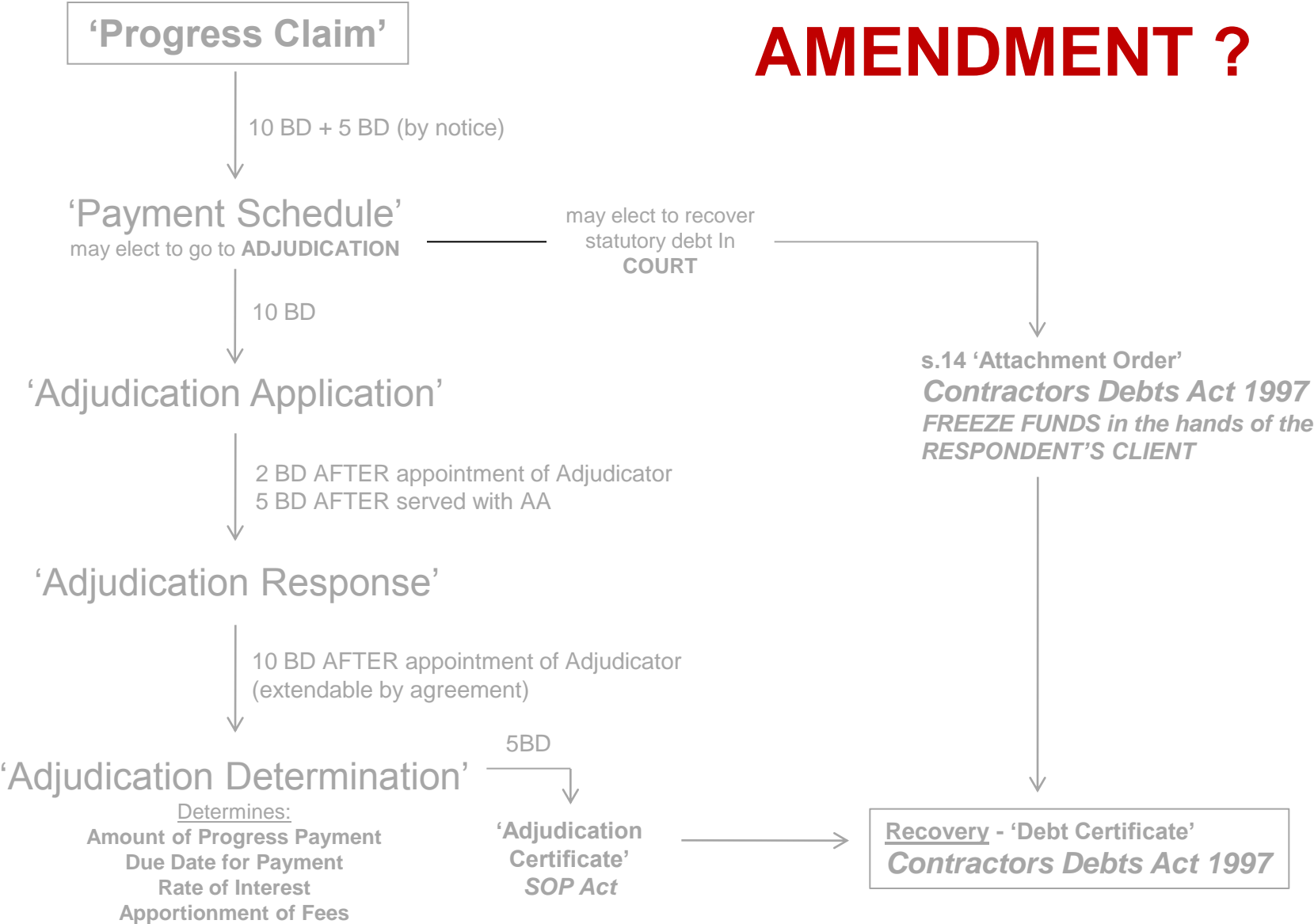


Recovery - 'Debt Certificate'
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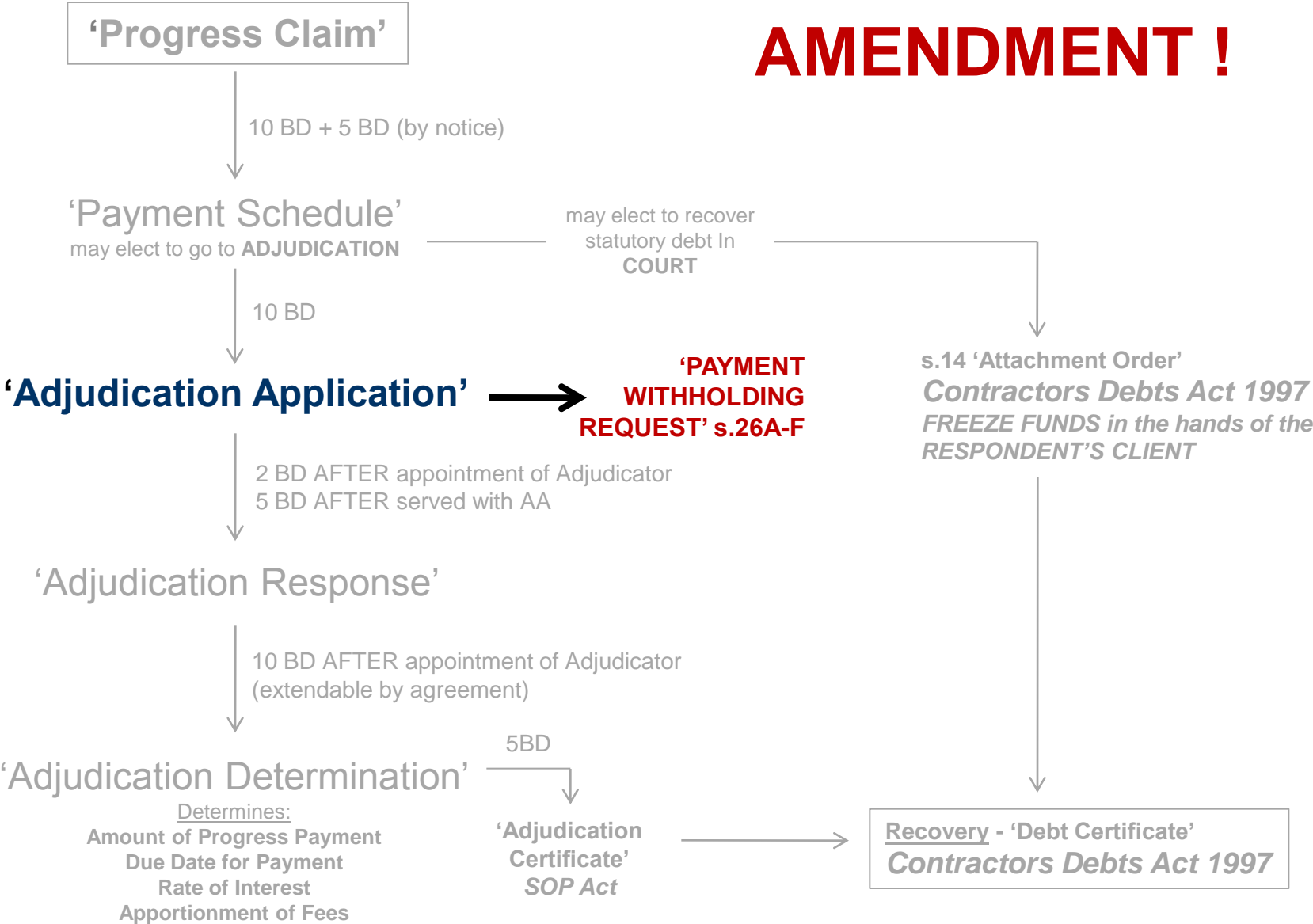
CURRENT PROCESS (Court Option)



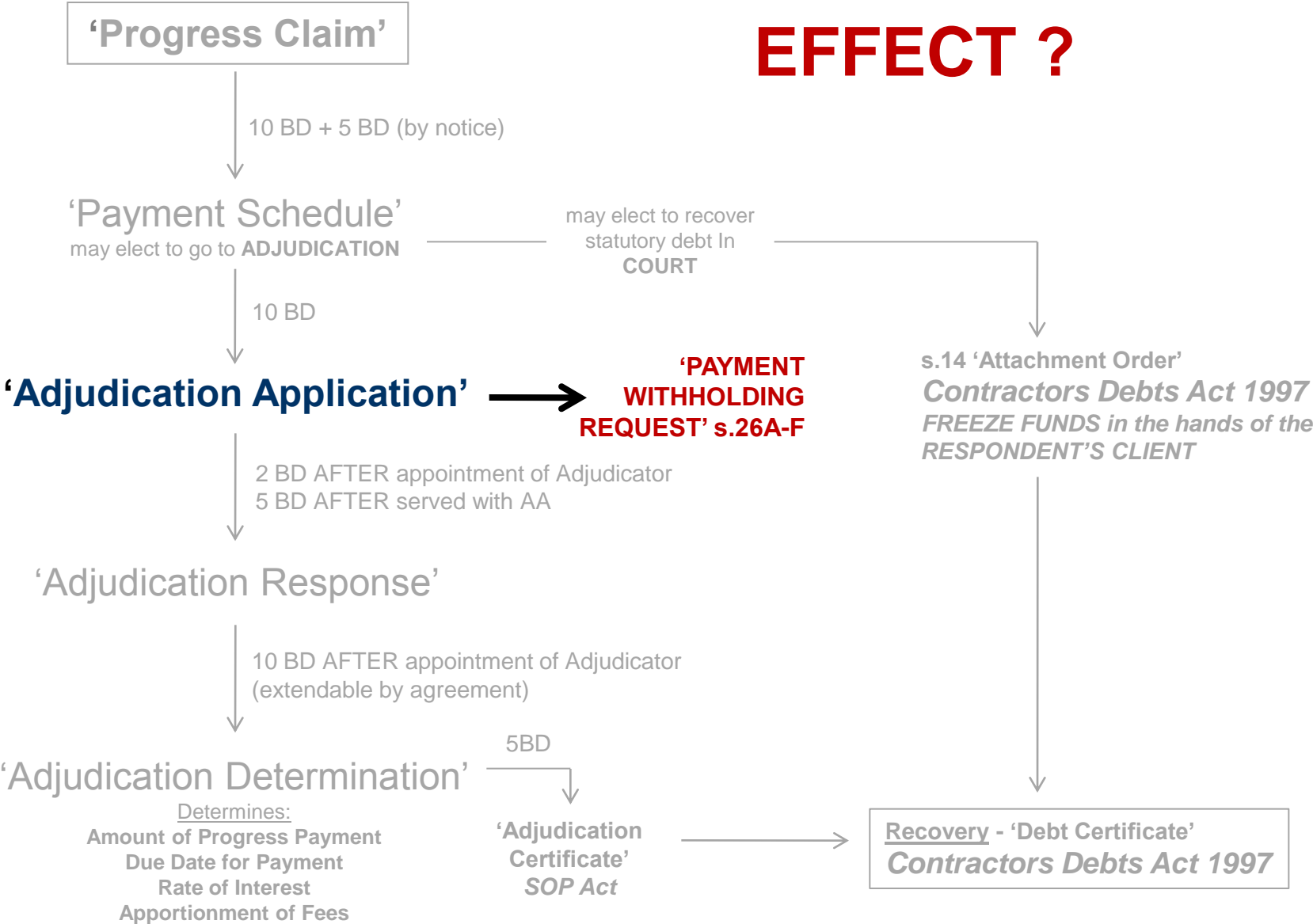
AMENDMENT ?



AMENDMENT !



EFFECT ?



'Progress Claim'

10 BD + 5 BD (by notice)

'Payment Schedule'

may elect to go to ADJUDICATION

10 BD

'Adjudication Application'

may elect to recover statutory debt In COURT

'PAYMENT WITHHOLDING REQUEST' s.26A-F

s.14 'Attachment Order'

Contractors Debts Act 1997
FREEZE FUNDS in the hands of the RESPONDENT'S CLIENT

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

5BD

'Adjudication Certificate'
SOP Act

Recovery - 'Debt Certificate'
Contractors Debts Act 1997

EFFECT !

INCREASED CHANCE OF RECOVERING ADJUDICATED AMOUNT

KEY ELEMENTS

Principal's obligation – \$ AMOUNT

The amount stated in the Payment Withholding Request

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Obligated to retain the smallest of:

- A. The CLAIMED AMOUNT \approx \$ stated in PWR
- B. The amount owed, or which subsequently becomes payable, to the Respondent when or after the PWR is served \pm \$ stated in PWR
- 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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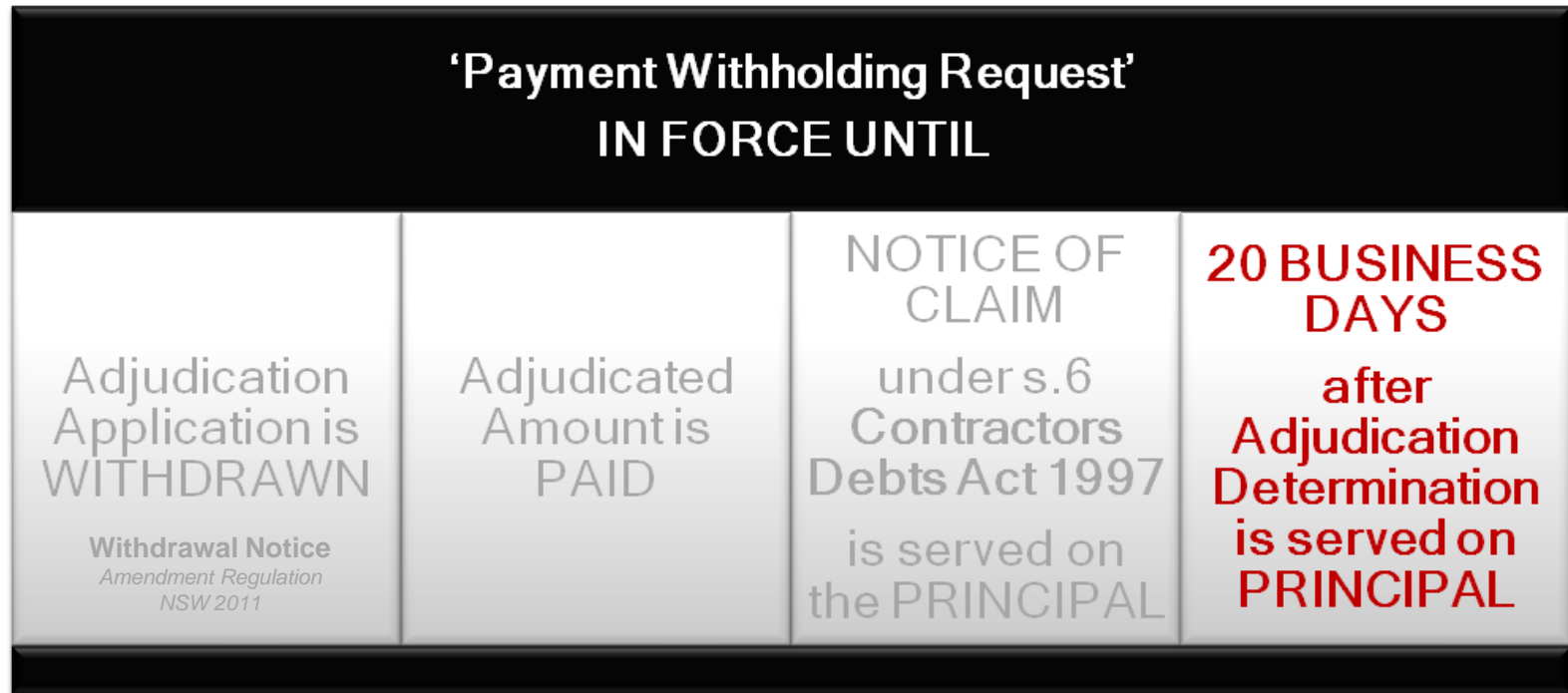
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What if 'the work or materials' NOT discernable? - e.g..under LS contract

KEY ELEMENTS

'Payment Withholding Request' IN FORCE UNTIL			
<p>Adjudication Application is WITHDRAWN</p> <p>Withdrawal Notice <i>Amendment Regulation NSW 2011</i></p>	<p>Adjudicated Amount is PAID</p>	<p>NOTICE OF CLAIM under s.6 Contractors Debts Act 1997 is served on the PRINCIPAL</p>	<p>20 BUSINESS DAYS after Adjudication Determination is served on PRINCIPAL</p>

KEY ELEMENTS



What if NO possibility of an Adjudication Determination being made?

KEY ELEMENTS

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