

MES Update December 2011

CONGRATULATIONS TO HON GAIL GAGO FROM ALL WITHIN OUR INDUSTRY

Start date for BCIPA Confirmed – 10 DECEMBER 2011

Some Festive cheer

At long last the Building and Construction Industry Security of Payment Act 2009 will commence in South Australia on 10 December 2011 and will apply to construction contracts entered into after that date.

The journey of the Act has been long and hard but well anticipated because at long last there will be a proven way to help and support subcontractors in the dealing with the “*security of payment problem*” ...

In his Second Reading speech Mr Kenyon the Minister explained that this problem arose when the subcontractors and suppliers in the building and construction industry “*are unable to secure in a timely fashion, or sometimes at all, payment for work performed or goods and services supplied despite in many cases having a contractual right to such payments.*”

The commencement of the Act now provides subcontractors with a statutory process for the recovery of monies for construction work and related goods and services which involved adjudication by an Adjudicator of disputed payment claims.

Background to the Act

The Act is modelled on legislation in the United Kingdom.

From the UK, various models of the Act travelled to Australia, Singapore and New Zealand.

The Act was first introduced on Australian soil in NSW over 10 years ago.

In 2002 and after the introduction of the NSW model, the Cole Report into the Construction Industry in Australia made recommendations for the introduction of a National Adjudication Scheme.

Despite those recommendations each state and territory in Australia has now implemented its own legislation with South Australia being the final state to come on implement its own Act on 10 December 2011.

Key features of the Act.

The key features of the Act include the following:

- (a) a statutory entitlement to receive progress payments
- (b) the abolition of ‘pay- when - paid’ clauses
- (c) the right to compel payment from the principal
- (d) the statutory entitlement to suspend work
- (e) the denial of the right to contract out of the Act

Importantly the provisions of the Act and the contract between a subcontractor and a builder will generally run side by side.

Where the contract may require dispute meetings and Court proceedings before payment can be made, the Act provides a fast track solution where a disputed claim for payment can be decided by an Adjudicator.

The decision of an Adjudicator is not a final and binding determination on the parties.

The parties final dispute including all adjustments and final reconciliations will still be available under the contract between the parties.

The purpose of the Act is to free up cash flow so that businesses can survive. Any contractual disputes can be sorted out ultimately under the Contract.

The experience in the Eastern States who have had the Act in force for some time now is that often when an Adjudicator makes a decision, the parties resolve their differences under the contract.

How does the Act work?

The Act works by providing a 5 step process for statutory recovery outside the courts.

These steps are novel and unique and not included in traditional legal text books.

These steps consist of the following:

- Step 1** - issue of Payment Claim by Claimant
- Step 2** - provision of Payment Schedule by Respondent
- Step 3** - Adjudication
- Step 4** – Determination by Adjudicator
- Step 5** – Enforcement of Determination by the Claimant

The key to the effective use of the Act is managing the time limits.

The Act provides guillotine time limits that are critical and which cannot be extended or negotiated. A failure to comply with the time limits under the Act can have catastrophic consequences.

The Payment Claim – the key document for a claimant

The most critical document in the process for the Claimant is the Payment Claim which sets out the details and basis of the claimed amount.

Some of lessons that can be learnt from the Courts in the Eastern States in relation to the Payment Claim include the following:

1. The Payment claim must be clear on the face of the document that it “purports” to be a Payment Claim under the Act.
2. The Payment Claim should contain “*precision and particularity*” to “*a degree reasonably sufficient to apprise the parties of the real issues in the dispute.*”
3. A Payment Claim must be comprehensive as it is not possible to raise new matters in the Adjudication Application that were not part of the Payment Claim.

The Payment Claim is the very first document in the process.

In our next publication we will consider the contents and form of a valid Payment Schedule.

Learning Curve

The learning curve in the use of the Act by the Construction Industry in South Australia will be steep and mistakes will be made along the way.

The key however to a successful outcome under the Act will be good documentations, a clear understanding on how the Act works and proper contract administration procedures.

MES has experience and is well resourced to deal with all manner of issues that may arise under the Act including any disputes that may arise under construction and engineering contracts.

During the course of the early 2012 MES will be conducting a series of workshops and education programs to assist the construction and related industries in understanding how the Act will become a day to day issue for businesses and how that Act can be used effectively in the recovery of legitimate entitlements.

We have incorporated an alliance with our Associate, whom I regard as one of the most highly experienced and competent Legal Practitioners that I have witnessed in Client representations for the Security of Payment Claim. Mr David Glinatsis.

We jointly believe that Clients will be best served with the Contractual compliance experience of Bruce Harris. With over 45 years of working in major and minor projects in the Construction Industry.

In the meantime from our team with MES we wish you a happy and safe Christmas and look forward to working with you next year.

SA Business Journal – The Advertiser December 6 2011

Page 12 Article – No More Money for Aquatic Centre Firm

Transport Department CE, Mr Rod Hook is quoted as saying “The Building variations that were never authorised by the Department.”

Mr Hook further stated, “If he (Candetti Constructions) has subbies who haven’t been paid, it’s not my job to give him more money because people are asking for it.”

Again who is carrying the can for the State Government Project? Just cast your eye to the horizon of the project – it’s the sub-contractors. That has been my personal dilemma during our business livelihood and career. We have not had nice cars, caravans or holidays for 25 years, we work to keep the door open. We can provide the service on time and compliant but the key factor is – All we ask for is to be paid in full and on time by the Builders or client.

We have in our client listing, sub-contractors and suppliers who are:

- Biting their nails to the quick
- Their families are very worried where the Christmas cheer will come from – A real family crisis!
- Trades who are not game to pull the plug on their builder, are continuing to roll up more and more indebt

The extremely large amounts outstanding are in the order of millions of dollars. I just shake my head in shame on the industry to allow progression and stakes to be so low. I have been told by the trades to just sit on my hands, they have raced past the desperate dilemma.

In closing we wish to record our congratulations to our festive season saviour, Minister Gail Gago and her very dedicated staff.

The Christmas present that we at MES Pty Ltd and the over 1,000 clients and members are going to toast to that on Saturday night 10th December 2011, as that is when the Security of Payment Legislation will take effect.

It is law on Saturday 10th December 2011 so let us toast sensibly.

Again while the pain of the subbies will continue to linger on, all contracts signed after Friday night come under the umbrella of the Ministers new Legislation which is 10 years overdue in our State.

If you would like to be on our mailing list or know of anyone who would like to be kept up to date with the correct information, please email your details to bhpm@internode.on.net and register.

Bruce A HARRIS M.I.P.A. A.I.R.A.H. F.A.I.C.D. A.I.P.M

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