

Construction Contracts – Buyer Beware

By Alanna Van der Veen 5/2/2008

Companies that engage contractors to undertake construction work should be wary of the provisions of the *Building and Construction Industry Security of Payment Act 1999*.

The object of the Act is to ensure that any person who undertakes to carry out construction work under a construction contract is able to recover progress payments in relation to the carrying out of that work and supplying those goods and services. The legislature hoped to improve the ability of contractor's to be paid progress payments when working on lengthy jobs by enacting this legislation.

However, the legislature has arguably swung too far in favour of the contractor in this case.

Under the legislation, if the contractor serves a "payment claim", made in accordance with the Act, on the person who is liable to make the payment under the construction contract, the only way that the payment claim can be disputed is for the party served with the payment claim to provide a "payment schedule" to the contractor. A "payment schedule" must set out the amount of the claim that the served party intends to pay, and why it is less than the amount stipulated in the payment claim.

If the person served with the payment claim does not provide the contractor with a payment schedule and does not provide payment within the time required by the relevant contract, or within 10 business days after the payment claim is served, **the person becomes liable for the whole amount to the contractor.**

If the contractor chooses to take the person to court because of a failure to comply with the payment claim, the person served with the payment claim is **prohibited from filing a cross-claim, or from defending the matter based on matters arising under the construction contract.** This basically restricts the defendant from defending the matter on any basis other than that the payment claim was not served in accordance with the Act, which can be a difficult argument to make.

Given these extreme restrictions on the rights of persons served with a payment claim to deny their liability of the claim under the Act, it is essential that a person served with a payment claim **see a lawyer to ensure that the payment schedule is drafted in accordance with the legislation.**

For more information on this article, or to discuss the drafting of a payment schedule, please contact the writer, Alanna Van der Veen, lawyer at Emery Partners 02 4969 3244 or enquiries@emery.com.au.