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New South Wales Returns Fire in the Security of Payment Wars

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The proposed changes are set out in a recently released public consultation draft of the *Building & Construction Industry Security of Payment Amendment Bill* 2018 (**Exposure Draft**). Some of the changes seem consistent with recommendations in the Murray Report, others not so, or cover ground not the subject of Murray report recommendations.

The highlights of the Bill, include:

1. Reference Dates

Whereas the Murray Report recommended the abolition of reference dates and the adoption of a simple entitlement to make monthly claims, the Exposure Draft contemplates turning a two paragraph definition of "*reference date*" into a ¾ page epic in which:

- Contracts that specify fewer than monthly reference dates are read down to monthly.
- Where the contract involves only a single or one off payment the reference date is the day after the work or related goods and services were supplied.
- Reference dates based on milestones are be recognised (and in doing so are carved out from exposure to implied monthly reference dates).
- Where a contract is terminated, a reference date arises the following day (being consistent with recommendation 17 of the Murray Report), providing another reason to instead take the work out of the hands of the contractor, as opposed to terminating, where the contract permits.

2. Shortening Due Dates for Payment

The Exposure Draft proposes maximum time periods for progress payments as follows:

- payment by a principal to a head contractor- within 10 business days (currently 15).
- payments by a head contractor to a sub-contractor within 20 business days (currently 30 days).

It is generally recognised that the current 30 day period is excessive. Whilst 20 business days is an improvement the question remains why sub-contractors must wait four weeks when the head contractor will have to wait only two.

3. Endorsement of Payment Claims

Like the Phoenix rising from the ashes, the Exposure Draft proposes the reintroduction of the endorsement, or something close to it. To be a payment claim under the Act the claim "*must state that it is made under this Act*". Common sense may yet prevail!

4. Withdrawal of an Adjudication Application

The Exposure Draft proposes that a claimant may withdraw an adjudication application at any time before the application is determined. Interestingly it does not address responsibility for the payment of the adjudicator's fees when that occurs. No change is contemplated to section 29(2) which provides that:

"The claimant and the respondent are jointly and severally liable to pay the adjudicator's fees and expenses."

The existing section 29(3) already provides the adjudicator power to determine the parties' respective contributions to the adjudicator's fees and expenses and the existing section 29(4). Interestingly it already appears to contemplate withdrawal of the application (although there was no express entitlement under the Act to so withdraw).

5. Time for Adjudicator to make a Determination

The Exposure Draft proposes that, where the respondent is entitled to lodge an adjudication response, the ten business days to reach a determination will commence on the date the adjudication response is lodged or, if no adjudication response is lodged, immediately after the time for lodgement of the response expires.

However, if the respondent is not entitled to lodge an adjudication response then time for making the determination will commence running on the date the adjudicator accepts their nomination (i.e. no change to the existing position in that circumstance).

6. Judicial Review

Big changes are proposed around judicial review of adjudicator's determinations.

As things stand it is all or nothing. There is currently no power to excise an invalid part of a determination. For example, a material deficiency in the measure of natural justice applied to one part of a determination or an error in accepting a claim that is properly characterised as damagescan (and often does) operate to contaminate the entire determination, despite the issue not touching upon or relating to much of the determination. It is a 'scorched Earth' approach. Nothing survives.

The Exposure Draft proposes much more flexibility entitling the Court to:

- Make an order setting aside the determination, in whole or in part,
- An order remitting the matter to the adjudicator for redetermination in whole or in part; and
- Any other order that the Court thinks fit.

The shackles have been thrown off! The explanatory memorandum to the Exposure Draft suggests that this will reduce the number of applications to the Supreme Court for judicial review. That's a big call.

7. Claimants in Liquidation

The Exposure Draft provides that a corporation in liquidation cannot serve a valid payment claim under the Act or take any action to enforce a payment claim or a determination under the Act. An adjudication application not finally determined before the day the liquidation commences "*is taken to have been withdrawn on that day*".

This is perhaps at odds with the philosophy behind recent *ipso facto* amendments to the Corporations Act, but nonetheless consistent with the interim context of the progress claim and adjudication regime.

8. Other Reforms

This note does not purport to be a comprehensive review of the Exposure Draft. There are other changes, many relating to enforcement, penalties and administration which amongst other things include:

- Opening the way to a code of practice for authorised nominating authorities;
- Entitling sub contractors to inspect trust account records in respect of retention trusts;
- Increased penalties for offences under the Act; 8.4 Enhanced investigative powers and rights of entry for offices of fair trading and their delegates;
- Accessorial and executive liability for those who aid, abet, counsel or procure breaches of the Act as well as personal criminal liability for corporate misconduct.

9. Conclusion

Whilst many of the changes to the procedures for making payment claims and adjudication determinations seem appropriate, a few elephants remain in the room.

It is again disappointing that ambush claims have not been addressed. It remains the case that respondents are only permitted five business days to prepare and lodge their response to an adjudication application that could relate to a payment claim and an adjudication application that have been months in formulation. It will remain the case that respondents will not receive a fair go.

Further, the Department's hope that the number of adjudication determinations taken to judicial review will reduce will not be realised. Respondents are and will remain rightly aggrieved by the structural imbalance presented by 5 business days to respond. Accommodating ambush claims leave respondents with little option other than to go hard with judicial review.

The reforms also fail to address the tendency for adjudicators to strain to read down enforceable and comprehensive contract terms, in the knowledge it is likely to be seen as an error that won't invalidate the determination. This gives rise to concerns on so many levels, clearly serving to knee-cap confidence in the system.

Sadly, the Exposure Draft does not engage with these persistent elephants, other than to continue to feed them. They are however addressed in John Murray's report.