Article Information

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Tripartite subcontracts: The new road block to subcontractor cash-flow?

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A full investigation may reveal that to be the case (and therefore liable to be held a void as an attempt to contract out of the Act), but do you really want to be the one put to the expense of demonstrating that, on the balance of probabilities, to the Supreme Court? It is well understood that the security of payment regime is by far the fastest, cheapest and most efficient method for contractors to secure payment of their progress claims. Whether the respondent is disputing the claim, or just tardy in its payment behaviour, the 'pay now argue later' legislation, while technical, is typically an effective express lane to securing payment.

However, like any 20 year old highway, there are cracks starting to appear. One major problem identified in our article: 'Security of Payment and Factoring. Not so Fast!' is where a 'debt' claimed by a payment claim has been separated, by assignment, from the claimant.

The *Building and Industry Security of Payment Act 1999* (NSW) *(***the Act***)* does not respond well, as the rights it grants and liabilities it imposes are personal to the 'claimant' (being the person who has undertaken work under the construction contract) and the 'respondent' (being the person under the construction contract liable to make a progress payment).

The structure of the claim entitlement under the Act is also being tested in other ways. A relatively recent approach is for head contractors to structure their subcontracts as tripartite agreements, expressly passing all payment obligations for works performed by subcontractors to a 'superintendent' or other functionary who stands separate from the broader contractual chain. If the superintendent is not good for it, which seems to be a theme, there will be nothing to enforce payment against.

This approach relies upon the head contractor being contractually quarantined from receiving payment claims and making payments. Further, the principal is (to an extent) quarantined, as their contract is with the head contractor alone (not with the superintendent).

Further, the rights that subcontractors have to go 'up the chain' against principals, through payment withholding notices, garnishee notices and Contractors Debts Act remedies are not readily available where there is no contractual relationship between the principal and the party liable to pay under the subcontract.

All this of course begs the question of why a superintendent would agree to take on the payment obligation without an express right to enforce the same 'up the chain'. Yep, it's probably a sham!

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Tripartite subcontracts can make enforcement of a subcontractors' rights through security of payment more difficult, expensive and doubtful. This stands to distance subcontractors from the benefits of the fast, cheap and often very effective remedies available under Security of Payment Act regime.

An ounce of prevention is better than the cure. Subcontractors should be alive to the pitfalls of tripartite subcontracting, and be very cautious, even suspicious, when presented with one.