

KQ NEWSLETTERS

May 2010

Accounting Practices Under The Building And Construction Industry Security of Payment Act 1999

KQ Lawyers were recently involved in a case for a Claimant that brought a claim under the Building and Construction Security of Payment Act 2002 ('the Act') which came before the NSW District Court. The matter was eventually settled to the satisfaction of our client, however, the case shone a light on the issue of the preparation of Payment Claims for Claimants.

NO PAYMENT SCHEDULE

Because the Respondent had failed to make payment either in whole or in part and or respond to our client's Payment Claim KQ Lawyers advised the client that it could rely upon the Act to commence proceedings at Court for judgment of the amount claimed.

A Payment Schedule is a document which must be prepared by a Respondent in response to a Payment Claim. It must provide all and any reasons why (if applicable) the head contractor or principal proposes to withhold or refuse payment.

SUMMARY JUDGEMENT APPLICATION

The Claimant had issued a proper Payment Claim under the Act. However the matter came before a Judge who had very limited experience under the Act and the Respondent took advantage of this fact.

The Respondent asserted that the payments which had been previously made by it to the Claimant should be attributed to or deducted from the amount claimed in our client's Payment Claim.

In response submissions were made by Counsel for the Claimant that the arguments raised by the Respondent should have been articulated in a Payment Schedule and that such document should have been served on our client within 10 business days of receiving our client's Payment Claim.

The Judge was not, in the first instance, swayed by submissions made on behalf of the Claimant and as a result of the Respondent's erroneous argument, the matter ran for 2 days.

Eventually after familiarising himself with the Act, the Judge appeared to see the folly of the Respondent's position and intimated very strongly from the bench his intention to find against the Respondent.

As noted above, the matter was eventually settled on a 'once and for all basis' to the satisfaction of our client.

ACCOUNTING FOR CLAIMANTS UNDER THE ACT

Despite the fact that the matter was settled, the net effect of our client's matter is that Claimants under the Act must be aware that the Court may examine accounts and the amounts sought with a view to establishing that the amount claimed has not been paid before providing Summary Judgment. Thus, in the absence of accurate accounting records a Court may find that the claimed amounts have been paid by the Respondent and deny the right to Summary Judgment.

It is therefore essential when maintaining accounts for Claimants who wish to bring a claim under the Act that the following practices be adhered to and taken into consideration:

- (i) When making a Payment Claim, any unpaid portions of previous accounts are included in the subsequent payment claim – unless they have been addressed in a Payment Schedule and/or the amount waived by agreement.
- (ii) Payments made by a Respondent following the issue of a payment claim are to be deducted from the amount claimed in any subsequent application to the Court for summary judgment, unless you have evidence of the respondent directing that those payments were made in satisfaction of an older account.

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SUMMARY

The Act was implemented with a view to strengthening claimants' entitlement to receive progress payments and to streamline the procedures available for the recovery of amounts which are determined under the Act as being due and payable. However failure to maintain accurate accounting records and/or evidence that the amount claimed has not been paid can have a dramatic impact upon a claimant's ability to make use of the Act.

Sound accounting practices are essential for any one involved in the construction industry if they wish to make use of the Act to swiftly recover progress payments and ensure cashflow.

If you have any questions in relation to the operation of the Act do not hesitate to contact Paul Quinn of this office on 4862 2020.

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KQ LAWYERS HAVE EXPERTISE IN COMMERCIAL AND CONSTRUCTION LITIGATION. IF YOU WOULD LIKE FURTHER INFORMATION PLEASE VISIT OUR WEBSITE, EMAIL **PAUL QUINN, OR CONTACT US ON 02 4862 2020.**