

'CLAWBACKS' - THE NEW LEGAL RISK FOR BUILDING AND CONSTRUCTION

Building and construction companies, subcontractors and suppliers are encouraged to be alert as the *Building and Construction Industry Security of Payment Act 1999* (NSW), and its interstate equivalents, raises new risks for the building and construction industry.

With the Act being in force in New South Wales for a number of years, the long term effect of the Act are now being discovered as respondents try and balance the ledger by "clawing back" any overpayments made under the Act in separate legal proceedings.

The Act aims to provide an interim solution for Subcontractors who are trying to recover money from Contractors.

At best the Act provides 'rough justice'.

Any payments made under the Act are subject to a final determination of rights under the contract by the Courts.

If the Court finds that too much money has been paid under the Act, the Court may order that any overpayment under the Act be repaid by the claimant to the respondent.

Recovery proceedings are becoming more and more frequent and can be commenced many years after payments were received by claimants under the Act, surprising claimants who have long since spent the money.

A successful clawback action by a respondent can have significant consequences on a claimant that has received payments under the Act.

Not only may the claimant be required to pay interest on any overpayment, as indicated in a recent decision of the Supreme Court of NSW, it is possible that the Court may order that the claimant pay the costs of any clawback proceedings even if the Court finds that the claimant is entitled to keep most of the money that it has received under the Act.

This result could potentially have a serious impact on the cash flow of claimants.

As a result of these clawback actions, the Act has entered a new area of complexity as the Courts are being required to finally adjust the parties' positions under the Contract.

If a claimant is unable to prove that it is entitled to keep any of the money paid under the Act, the consequences for claimants could be very serious.

The threat of ongoing legal issues and the potential of long-term recoveries could discourage subcontractors from using the Act and force subcontractors to resort to traditional court proceedings.

For the time being, and until the full impact of clawback actions can be established, the Act continues to enable decisions to be made quickly so that cash can keep flowing until disputes over payment are finally resolved.

Used well, the Act can help parties to resolve their disputes by forcing them to 'reality check' their entitlements and to make a decision as to whether they should continue to fight or fold.

However, timeframes and processes under the Act are strict and not negotiable and penalise the party that is uninformed or not prepared.

Parties can also compromise valuable rights and entitlements by simply not knowing how to properly prepare their case within the tight timeframes.

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