

Building & Construction Law Update

Autumn 2009

Obligations to comply with the National Greenhouse and Energy Reporting Scheme

by Andrew Barclay

The Australian Government's scheme for carbon pollution reduction (the "CPRS") has continued to be debated since the release of the White Paper in December 2008 and the legislation exposure draft in March 2009. The government has now announced that introduction of the CPRS has been deferred for one year until 1 July 2011.

Receiving less attention is the *National Greenhouse and Energy Reporting Act 2007*. That Act creates a scheme (the "NGERS") that requires measurement of carbon dioxide emissions (and emissions of carbon dioxide equivalents) upon which the proposed CPRS is based. Unlike the CPRS, the government's announcement does not affect NGERS. The first NGERS reporting year (2008-2009) ends on 31 October 2009. Corporations to which NGERS applies must seek registration with the Greenhouse and Energy Data Officer by 31 August 2009. There are penalties for failing to comply. Penalties can be applied to the Chief Executive Officer of a corporation.

In the first year of operation the NGERS threshold for application to a controlling corporation is the emission of 125,000 tonnes of carbon dioxide by the corporate group. (The threshold mechanism is more complex than this, but that is the "headline" figure). The threshold reduces in two steps to 50,000 tonnes in the third reporting year (2010 – 2011).

It seems likely that only a small number of businesses operating in the building and construction industry in Australia will be required to register under NGERS – at least in the first year of operation.

But does this mean that all the others will escape from NGERS' various data collection and reporting requirements? If a controlling corporation is subject to NGERS will the carbon dioxide emitted by its subcontractors (and sub-subcontractors, etc) be counted as part of the controlling corporation's emissions?

The Department of Climate Change's National Greenhouse and Energy Reporting Guidelines say:

"The controlling corporation for a corporation deemed to have operational control over a facility that meets a facility threshold is responsible for reporting all greenhouse gas emissions and energy data associated with that facility – including greenhouse gas emissions from and energy produced by the activities of contractors and subcontractors. That is, the corporation with operational control is responsible for collecting contractor data and incorporating the data in its own report".

So, how will the controlling corporation ensure it receives contractor and subcontractor data? Will it seek to impose contractual terms requiring those subcontractors to collect data and report to the controlling corporation (and so on down the contracting chain)? In a November 2007 submission on the NGERS Regulations Discussion Paper, Leighton Holdings Limited (LHL) foreshadowed "complex contractual issues in terms of obtaining emissions and energy information from the

multitude of contractors and sub-contractors working on a site."

Due to the complexity of these issues, especially in the context of "long-term infrastructure construction projects" LHL asked for the commencement date of reporting obligations for the construction and mining industries to be deferred "until reliable and accurate data can be obtained through robust contractual arrangements". The concession was not granted.

To the extent that many participants in the building and construction industry have not yet seen such "robust contractual arrangements", that is likely to be due to a lack of appreciation within the industry of NGERS and the need to understand and comply with it. That such contractual terms will become widespread appears inevitable, especially as the reporting thresholds are lowered in 2010 and 2011.

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Security for payment claims – misleading and deceptive conduct

by Tony Mylne

In a case decided in January 2009 *Austruct Qld Pty Ltd –v– Independent Pub Group Pty Ltd* Mr Justice Dutney of the Supreme Court of Queensland reviewed the influence section 52 of the *Trade Practices Act* (“TPA”) can have on Security for Payment legislation and in this case, the Queensland legislation the *Building and Construction Industry Payments Act 2004* (“BCIPA”).

Similar to the New South Wales legislation, the Queensland legislation, provides for the opportunity to obtain judgement in circumstances where a payment schedule is not delivered within 10 business days of receiving a payment claim. Such an application had been made in the *Austruct Qld Pty Ltd –v– Independent Pub Group Pty Ltd* case.

The Facts

Austruct had contracted to provide construction management services originally to the Munday Group Pty Ltd in relation to the construction of an outdoor deck area and renovations to the Elephant & Wheelbarrow Hotel in Fortitude Valley, Brisbane. The contract was assigned from Munday to the Independent Pub Group in these proceedings. The practice of the contractor, Austruct, was to supply all invoices and material to the architect appointed, Mr Truong.

In November 2008 the architect received from Austruct, by courier, a box of documents containing a letter with some trade certificates, invoices and supporting documentation. The letter stated:

“We refer to our ongoing discussions and we wish to confirm the following. We have been requested to submit a copy of the amounts owing to the subcontractors on this project. We have attached the summary. We have also attached the outstanding invoices.”

At the same time, a box of material similar, but not identical, was delivered to the registered office of Independent Pub Group in Sydney. That office was the service address only. There was no principal place of business run at that office. The principal place of business was in Adelaide. The documents delivered to Sydney contained a covering document constituting a payment claim.

The Court Proceedings

During the court proceedings evidence was given concerning a discussion between Mr Truong on behalf of Independent Pub Group and a Mr Hyde on behalf of Austruct. The discussion occurred shortly after the documentation was delivered to Mr Truong. The purpose of the discussion appeared to be to confirm delivery of the box of documents. Truong confirmed delivery and said he was a little surprised to have received the documents as it was usual to email in advance. He specifically asked whether the documents had been sent to the principal, Independent Pub Group, and Mr Hyde responded that a copy of the documents had been sent to the registered office in Sydney. After being asked whether he had a list of trade contractors holding certificates Mr Hyde finished the discussion by indicating that he only gave the documents based on advice from lawyers.

Under cross-examination, Mr Hyde effectively admitted that he had decided in the conversation with Mr Truong to describe what had been sent to Independent Pub Group as simply “a folder of information” rather than add, as was the fact, that what had been sent to the respondent also contained a payment claim which had a 10 business day time limit.

There was evidence from both Mr Truong and Independent Pub Group that each was very conscious of the possibility of a payment claim being served and had it been disclosed that a payment claim had

been delivered there would have been a process put in place to deliver a payment schedule. Because of the conversation Mr Truong had with Austruct, he believed that the documents received in Sydney did not in fact contain a payment claim.

The Decision

The Judge indicated initially that had the telephone discussion between Mr Hyde and Mr Truong not occurred and the documents were merely sent to both Sydney and to the architect, any responsibility for the misapprehension as to the nature of the documents sent to Sydney would have been due to the assumptions made by Independent Pub Group. Any silence in this respect would not have been misleading.

The Judge found that as a result of Mr Hyde telling Mr Truong that the material received was a duplicate of the documents sent to Sydney then that was misleading in nature. As a consequence, the Court held that Section 52 of the *Trade Practices Act* had been breached and the Court dismissed the application by Austruct.

Commentary

While Courts have consistently supported applicants in default of a payment schedule, this is one example of the Court not willing to support “sharp practice” by applicants. There seems to have been an opportunity seized upon by Austruct to at least delay recognition that a payment claim had been served. Regardless the Court would have been unlikely to consider this an issue had there not been a discussion when the documentation was delivered in Sydney. As a result it would be wise for principals to document queries, if there is an imminent claim. This might be especially so in circumstances where service at registered offices may result in time delays between service and recognition of the urgency of the situation.

Changing the time for service of a payment schedule

by Chris Thompson and Andrew Barclay

The New South Wales Court of Appeal has given its decision in the case of *Thiess Pty Ltd –v– Lane Cove Tunnel Nominee Co Pty Ltd*. In this case the argument was about whether a clause in a building contract had replaced the statutory period for service of a payment schedule under the *NSW Building & Construction Industry (Security of Payment) Act 1999*.

Background

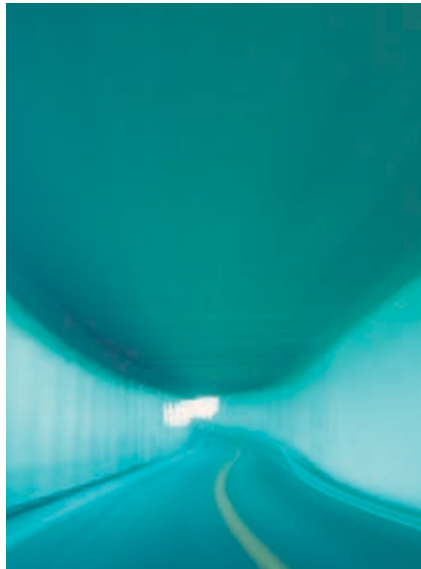
Thiess was contracted to construct the Lane Cove Tunnel on Sydney's North Shore for a price exceeding \$1 billion. Thiess made a progress payment claim under the Act for more than \$9 million. The amount claimed was disputed and LCT provided a payment schedule. But Thiess said that the payment schedule was not served on time. Thiess claimed that the contract had shortened the period of time for service of a payment schedule under the Act and that LCT's Schedule was out of time. On that basis Thiess sued in the Supreme Court for summary judgment.

The Supreme Court decision

The contract required a "payment schedule" to be served within 4 business days. The statutory period (section 14(4)(b)(ii) of the Act) is 10 business days. The parties agreed that the relevant test was whether, on a proper reading of the contract, the parties intended the time period in the contract to replace that specified in the Act. They also agreed with the Judge, Hammerschlag J, that there must be "clear contextual" support for such a reading. But, rather than there being contextual support in the contract for replacing the 10 day period, the Judge said that there were "clear contextual" implications pointing in the opposite direction. These implications came from differences between the payment claim procedure in the contract and that in the Act. The differences indicated that the time allowed for a

"payment schedule" in the contract related only to the payment claim procedure in the contract and did not relate to the Act.

For example, the contract said that LCT's payment schedule could not state an amount that was less than the amount certified by the Independent Verifier – unless the procedure in the contract for disputing the amount certified was followed. Once that procedure was started, determining the amount of the



payment claim that LCT had to pay was diverted to a process in which the 4 Business Day period did not apply and which had no parallel in the Act. In truth, the 4 Business Day period in the contract was a part of the contractual progress payment procedure and had nothing to do with the payment claim/payment schedule/adjudication process in the Act.

The application by Thiess was dismissed.

The Appeal Action

Thiess appealed. The NSW Court of Appeal agreed with Justice Hammerschlag's decision, but said that the test of "clear contextual" support was wrong. The question is simply what the contract said, if anything, about the time within which a statutory payment schedule is to be provided. The Court of Appeal said that if the contract made no reference to the time for providing the statutory payment schedule (which it did not), the time period allowed in the Act must apply.

Outcome

The uncertainty in this case arose from the creation in the contract of a procedure for processing progress claims that uses similar terms as the Act – in particular "payment claim" and "payment schedule". This has become a common practice since the implementation of various security of payment schemes around Australia. Does this approach have any value? The statutory security of payment procedure cannot be displaced by one of similar appearance (but different effect) in a contract and, as this case shows, courts will not use bits from such a contractual scheme to modify the legislation. Parties to a building contract can change the period allowed in the Act for providing a payment schedule, but the contract must state the intent to do so clearly and without ambiguity.

Negotiating Indemnity Clauses

by Andrew Barclay

Indemnity Clauses are common in a wide range of construction and engineering contracts. For example, Clause 17 of AS2124-1992 makes the Contractor indemnify the Principal for personal injury and damage to property other than the works. Indemnity provisions are also contained in earlier forms of AS2124 and in its successor – AS4000.

Depending on the drafting and the context, indemnity clauses vary in the effect they can have on the rights of the parties. To negotiate an indemnity clause in a contract some knowledge about these clauses is essential.

The interpretation of indemnity clauses is relatively straight forward when the liability of the person giving the indemnity (the “indemnitor”) is generally no greater than they already have for breach of the contract. The position becomes more complex when the question arises as to whether an indemnity clause makes the indemnitor liable even where it is not responsible for the loss.

Clause 17.1 of AS2124-1992 expressly excludes some of these circumstances from the scope of the indemnity. It says that “the Contractor’s liability to indemnify the Principal shall be reduced proportionally to the extent that the act or omission of the Principal may have contributed to the loss, damage, death or injury.” However, it is often the case that indemnity provisions in building and construction contracts in Australia are not specifically limited in this way.

Where a party to a contract wants the protection of an indemnity even where they have caused or added to their own loss, they are unlikely to want an indemnity which specifically says so - because that would be strongly objected to. Typically therefore, a much more general form of words will be adopted. For example, the indemnity may simply be for “all liability relating to the works” which, by being more general, may appear less threatening.

There are many court cases that have interpreted and applied contractual provisions of this kind. The approach in Australia was confirmed in the 2004 decision of the High Court in *Andar –v– Brambles*. Very broadly, the law in Australia is that if the indemnity is to compensate the person relying on it in circumstances where they have caused or contributed to the loss, a court will apply the clause in a way that is as narrow as reasonably possible while still being consistent with the meaning of the words used. If, even given that narrow interpretation, the clause is ambiguous, the meaning adopted will be that which narrows the scope of the clause further.

In practice, this approach seems to favour a clause that is expressed as broadly as possible. The result is that although a generally worded clause may appear acceptable it may in fact impose strong liability. An example is *BI (Contracting) –v– AW Baulderstone Holdings*, a decision of the New South Wales Court of Appeal. In that case, both BI and Baulderstone were negligent. A clause under which BI promised to indemnify Baulderstone “against all liability relating to the subcontract works” was held to entitle Baulderstone to an indemnity from BI even though Baulderstone had itself contributed to the loss.

The variety of terms used in indemnity clauses can add to the difficulty for negotiating parties who need to identify what potential liability an indemnity clause is imposing upon them. Some useful points to remember in negotiations are:

- If the contract describes the indemnity as being for losses arising from performance by a contractor of its work, it is not likely that this entitles the other party to an indemnity for loss caused by its own negligence.

- The phrases “all liability”, “relating to” and “in connection with” all tend to expand the scope of the indemnity.
- Indemnity provisions are often included in certificates or similar undertakings required to be given as a condition of completion. An acceptable indemnity clause in the body of the contract may be displaced by wider liability under indemnities that are in the contract’s annexures.
- Liability under a wider indemnity may not be covered by insurance (especially professional indemnity insurance).



Industry Alerts

National Interest

31% of Construction companies fail random audit

The Federal Workplace Ombudsman has announced that the recent random audit of construction companies in the greater Sydney region resulted in a 31% representation of companies in breach of workplace law. Some 282 companies' books were audited and breaches were found in relation to record keeping and entitlements. Employers voluntarily offered to rectify these situations and no further action was taken.

(Source Thomson Reuters)

Increase in dwelling approvals

Master Builders Australia has announced an increase in dwelling approvals.

MBA Chief Economist, Peter Jones said "The good news is that there has been an upswing in dwelling approvals which will, over time, translate into increased commencements and further stimulate the economy".

The March figures are expected to show a fall in housing commencements for the quarter. The MBA predicts 130,000 commencements for 2008-9 financial year representing a 17% decline on the 2007/8 financial year.

(Source Thomson Reuters)

Northern Territory

As a result of an audit showing that 43 non-government and 19 government buildings in the Northern Territory had outstanding certification requirements the Northern Territory Government has announced reforms to improve the certification rates. The first step will be the immediate independent assessment of Territory certification requirements. The assessors will also make recommendations to improve regional certification processes. The work will be undertaken by a senior officer with the Queensland Master Builders' Association and a Manager of Building Standards and Building Codes Queensland.

(Source Thomson Reuters)

Queensland

A public-private partnership between the State Government, Leighton Contractors, Leighton Services, the Commonwealth Bank and the Broad Group will construct seven 'eco friendly' schools in the South East Queensland corner. The partnership, known as the Aspire Schools Consortium, will rollout over four and a half years building schools in the fast growth areas of the Gold and Sunshine Coasts, Redlands and the western corridor. It is predicted the project will generate over 2000 jobs.

(source CCH)

New South Wales

From 1 April 2009 changes to the *Home Building Act 1989* came into effect providing for the automatic suspension of the licence of a home building contractor or consultant if there is failure to comply with orders of a Court or the Consumer, Trader and Tenancy Tribunal. A suspension will relate to orders for payment of building claims and not for rectification work or other types of orders.

Any suspension will be enforced until the Commissioner for Fair Trading is satisfied that the licence holder has complied with the order or, if the licence term expires.

(Source Thompson Reuters)

Victoria

On 11 March 2009 the Victorian Government adopted new Australian design standards for building in bushfire prone areas. The new fire resistant standards will rate homes on a six level scale of bushfire attack and add more than \$20,000 to the cost of building. The government will also review its policy on the regulation of native vegetation and land clearing which many believe contributed to the tragedy in February.

(Source Thomson Reuters)

Tasmania

On 4 March 2009 the State Member for Dennison, Lisa Singh, announced in parliament that security for payment

legislation was being drafted and will shortly be presented to the industry for comment.

In support the Premier, David Bartlett, stated that this form of legislation gave protection to the local industry and encouraged participation by builders in the various infrastructure and housing projects initiated by the State Government.

(source Hansard (Tas))

Western Australia

A recent District Court action has raised the issue of whether levies imposed by the *Building and Construction Industry Training Levy Act 1990* and paid in accordance with the *Building and Construction Industry Training Fund and Levy Collection Act 1990* are valid. The proposed Building and Construction Industry Training Fund and Levy Collection Amendment Bill 2009 intends to address this uncertainty by retrospectively validating all previous collections and by placing the provisions currently in Regulation 6 directly into the Act itself.

The proposed amendments will not change the method of collection or the value of the levy but will simply ensure that no doubt exists about the validity of the collection provisions.

(source Hansard (WA))

South Australia

The South Australian Office of Consumer and Business Affairs successfully prosecuted in 32 court matters last year. The Office reported that 18 breaches related to the activities of builders and tradespeople and 14 of those to unlicensed activity. Of the matters resolved in 2008 the outcomes included permanent cancellation of licences, a suspended prison sentence, fines of up to \$40,000 and orders to perform community service.

(Source Thomson Reuters)

Remote site accommodation (*Bluff*) Pty Ltd –v– *Wiltslow Holdings Pty Ltd*

by Tony Mylne

This case was decided in February 2009 in the Supreme Court of Queensland. It is a case considering the *Building and Construction Industry Payments Act 2004* in Queensland and will no doubt have application in other States administering similar legislation such as New South Wales and soon to be Tasmania and South Australia.

The case involved the time limit within which a payment should be made. Under the Act in Queensland, section 17 provides that a payment claim may only be served within the later of:

- (a) The period worked out under the construction contract; or
- (b) A period of 12 months after construction work, to which the claim relates, was last carried out.

It is subsection (b) that is most important in this case. In this case the only works that were carried out within a 12 month period of the payment claim were rectification of defects. Obviously money did not change hands for such rectification works, however the judge in this case indicated that this did not matter.

This case could have potential to increase considerably the timing of any payment claim. In Queensland some defects are required to be rectified up to 6 years after the building is completed. Under the principles discussed this could significantly increase the opportunity for a payment claim in those circumstances to up to 7 years following completion. There is some possibility that this decision may be appealed and the reasons have not as yet been published. In the meantime we rely upon the facts and the basis of the decision from colleagues within the Institute of Arbitrators and Mediators Australia.



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