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Construction Matters

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What Is a Payment Claim Under the Security of Payment Legislation?

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Executive Summary

Courts have observed that the requirements for a payment claim under the East Coast Model security of payment legislation (now adopted in Western Australia) are "relatively undemanding"[1] and generally will be satisfied by a contractual progress claim under standard form contracts.[2]

But what about a document that is not in the standard form of a payment claim? When will that be a payment claim for the purposes of the legislation, requiring the recipient to rapidly respond with reasons, at risk of being liable to pay the entire claimed amount?

We summarise below two recent intermediate appellate court decisions that considered this question. In short, the cases demonstrate that not every demand for payment for construction work (or related goods and services) will be a payment claim for the purposes of the legislation.

For **potential claimants**, the cases demonstrate that the operation of the security of payment legislation should not be assumed, and that compliance with the modest requirements for a payment claim should be confirmed.

For **respondents**, the cases suggest that in cases where an informal or unusual claim for payment is made, it may not attract the operation of the security of payment legislation, and there may be benefits in resisting its purported invocation.

First Decision – Letter of Demand From Solicitors of Administrators Held Not To Be a Payment Claim

The essential facts of *Total Construction Pty Ltd v Kennedy Civil Contracting Pty Ltd (subject to deed of company arrangement)* [2023] NSWCA 306 were that the subcontractor, Kennedy, entered administration, and the administrator's solicitors wrote a letter to the claimant, Total, asserting that Total was indebted to Kennedy for over AU$500,000, demanding payment within seven days, and attaching various invoices and records.[3] Total responded, denying liability and attaching a payment schedule for a previous payment claim, which had indicated that no amount was payable by the contractor to the subcontractor.[4]

Kennedy argued that (1) the demand was a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (NSW Act), and (2) Total had not responded with a payment schedule to it; therefore (3) it could recover the entire claimed amount as a debt under the NSW Act.

Though the primary judge agreed with Kennedy, the New South Wales Court of Appeal unanimously allowed the appeal and held that the correspondence was properly characterised as a letter of demand for payment of an outstanding indebtedness (as opposed to a payment claim pursuant to the NSW Act). Among other factors, Mitchelmore JA (with whom Meagher and Adamson JJA agreed) relied on:[5]

- The assertion in the letter that Total was "indebted" to Kennedy (in distinction to a claim for payment)
- The deadline for payment in the letter was less than the period permitted under the NSW Act for service of a payment schedule (i.e. 10 business days)
- The letter foreshadowed proceedings "to recover the outstanding [amount] as well as seek costs and interest" (in distinction to the adjudication process provided for under the NSW Act)

1 *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309 [36] (Richmond J), See also *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409, (2005) 65 NSWLR 462 [48] (Santow JA).

2 *Allencon Pty Ltd v Palmgrove Holdings Pty Ltd* [2023] QCA 6, (2023) 13 QR 258 [29] (McMurdo JA; Mullins P and Flanagan JA agreeing).

3 [2023] NSWCA 306 [14]-[16].

4 [2023] NSWCA 306 [17].

5 [2023] NSWCA 306 [29]-[30].

Though the attached invoices contained the statement required by section 13(2)(c) of the NSW Act (i.e. that they were claims made under the NSW Act), the court considered that, in context, the invoices reinforced the characterisation of the correspondence as a mere demand:[6]

- The invoices were dated "well before" the date of the letter, with four out of five invoices referring to amounts already paid
- Only one invoice contained any detailed description of the relevant construction work
- There was nothing on the face of one of the invoices to indicate the construction work to which it related
- The payment method specified in the invoices was inconsistent with the directions in the letter

Therefore, though the court accepted it was required to take "a 'fair but broad' and not 'pedantic'" approach to the compliance with the statutory requirements, having regard to the parties' dealings,[7] and though the court recognised that different cases may lead to different results,[8] the court concluded that "context cannot be a substitute" for the terms of the documents.[9]

Second Decision – Spreadsheet and Statutory Declaration Not a Payment Claim

In *MWB Everton Park Pty Ltd v Devcon Building Co Pty Ltd* [2024] QCA 94, the claimant, Devcon, issued two sets of documents to the respondent, MWB:

- On 30 June 2023, Devcon sent an email to MWB claiming payment in the sum of approximately AU$150,000, attaching a three-page spreadsheet and statutory declaration. The spreadsheet contained multiple tables relating to the different stages of works, along with an amount claimed in the project summary in the first table.[10]
- On 17 July 2023, Devcon sent an email to MWB attaching the same documents attached to the 30 June 2023 email, further documents, and tax invoices. The email asked MWB to "please organise payment at your earliest convenience". Though there is no requirement under the *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* (Queensland Act) for payment claims to state they are made under the Queensland Act,[11] the invoices included such a statement.[12]

MWB treated the documents issued on 17 July 2023, but not the documents issued on 30 June 2023, as a payment claim under the Queensland Act and issued a payment schedule.[13]

Devcon argued that the 30 June 2023 documents were a payment claim, and therefore MWB was liable for the entire claimed amount (as it issued no payment schedule in response to them). MWB argued that the 30 June 2023 documents did not meet the requirements of the Queensland Act.

The Queensland Court of Appeal, overturning the primary judge's decision, held that the 30 June 2023 documents did not constitute a payment claim under the Queensland Act. Dalton JA (with whom Brown and Kelly JJ agreed) held:

- The trade summary of a percentage of work complete did not sufficiently identify the work done for the purposes of the Queensland Act,[14] even though the parties had regarded it as satisfactory for 16 previous claims.[15]
- Though the 30 June 2023 documents stated an amount due, the Queensland Act requires there to be a connection between the amount claimed and the supporting information provided, which was not apparent from the 30 June 2023 documents.[16]
- Though the spreadsheet included in the 30 June 2023 documents identified an "amount due this claim",[17] those words were insufficient to satisfy the statutory requirement to "request[] payment of the claimed amount",[18] which the statute provides can be satisfied by using the word "invoice".[19] In reaching this conclusion, the court effectively overruled another decision of the Supreme Court, which held that a document entitled "progress claim" identifying a "total progress claim value for the month", and that stated it was submitted under the Queensland Act, did comply with the requirement.[20]

The strictness of the court's decision indicates that there may be many payment claims made in practice that do not attract the operation of the Queensland Act.

6 [2023] NSWCA 306 [32]-[33].

7 [2023] NSWCA 306 [35].

8 [2023] NSWCA 306 [38], citing *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309.

9 [2023] NSWCA 306 [35].

10 [2024] QCA 94 [10]-[15]

11 See *Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 68(1)

12 [2024] QCA 94 [16]-[18].

13 [2024] QCA 94 [19].

14 [2024] QCA 94 [25], citing *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178.

15 [2024] QCA 94 [26].

16 [2024] QCA 94 [27]-[33].

17 [2024] QCA 94 [13].

18 [2024] QCA 94 [35].

19 *Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 68(3).

20 *Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd* [2024] QSC 16 [138]–[142] (Wilson J).

How Effective Is Your Right to Security?

Author – Melissa Koo, Partner

In *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162, the New South Wales Court of Appeal has just handed down a decision that effectively allows payment claims for the recovery of security converted to cash despite the claim not being for "construction work".

Facts

In 2020, the appellant subcontractor (EnerMech Pty Ltd (EnerMech)) entered into a contract with the respondent joint venture (Acciona Infrastructure Projects Australia Pty Ltd, Samsung C&T Corporation and Bouygues Construction Australia Pty Ltd (the JV)) for EnerMech to undertake electrical installation works for part of the WestConnex project, Australia's largest road infrastructure project.

In 2023, the JV had recourse to security under the contract, in the amount of AU$9,230,157.40. EnerMech responded by issuing a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (NSW SOPA) to the JV for the amount of approximately AU$10 million (Payment Claim).

EnerMech applied for adjudication of the Payment Claim. The adjudicator issued a determination in favour of EnerMech in the sum of AU$10,180,582.60 (Determination).

The JV then commenced proceedings to quash the Determination on the basis that the Payment Claim was not a "payment claim" for the purposes of the NSW SOPA as it was not a claim for payment for construction work or related goods or services, but instead, in substance, a claim to recover amounts obtained by the JV in exercising a contractual right to recourse to security.

Primary Decision

The primary judge, Stevenson J, in the Supreme Court of NSW, upheld the JV's claim.

Stevenson J considered that the Payment Claim was, in substance and in form, not a claim for "construction work" and quashed the adjudicator's Determination on the basis that the Payment Claim was not a valid payment claim under the NSW SOPA and therefore the adjudicator did not have jurisdiction.

Decision on Appeal

EnerMech filed a notice of appeal seeking to have the judgment set aside.

The New South Wales Court of Appeal allowed the appeal and ordered that the JV pay EnerMech the amount of AU$10,160,109.77 (the difference from the Determination being an accepted deduction paid before the date of the Determination but after the date of the Payment Claim) plus interest.

The Court of Appeal held relevantly that:

- "A payment claim must be for an amount of money; the claim must assert that an amount is payable for work done, goods supplied, or services rendered, under a construction contract. The definition of "progress payment" requires that there be a "construction contract" and that there be consideration or amounts payable under it: [9], [61]."
- "When considering the objects, structure and spare language of the *Security of Payment Act*, as well as the judicial analysis since its inception, there is little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule: [9], [73]. The claim stated that the claimant was owed an amount for construction work undertaken under the construction contract: it was therefore a valid payment claim: [76]."

The Court of Appeal also held that if there were such conditions essential to the validity of a payment claim, it would be a matter to be determined by an adjudicator and not a court.

Implications

The New South Wales Court of Appeal decision favours contractors as it potentially allows broader payment claims to be made by not reading in unstated conditions as impacting the validity of a payment claim under the NSW SOPA.

The decision will have practical implications for principals or those who hold or have the right to access security under construction contracts. The obvious question is whether this effectively dilutes the right to security under a construction contract if the amounts can be claimed back by a contractor in a future payment claim. Parties holding security under a construction contract are advised to ensure appropriate drafting accounting for this risk at the time of contract formation, and also to seek legal advice prior to having recourse to security.

Navigating Risks in Battery Energy Storage Construction

Authors – Melissa Koo, Partner, and Rachel Pachacz, Senior Associate

Energy Storage in Australia

In November 2023, the State Electricity Commission of Victoria (SEC) announced its investment of AU$245 million in the Melbourne Renewable Energy Hub, which will be a AU$1 billion storage facility capable of storing enough energy to power up to 200,000 homes during peak periods.

On 26 March 2024, the *Climate Change and Energy Legislation Amendment (Renewable Energy and Storage Targets) Act 2024* (Vic) (Act) received royal assent. Among other things, the Act amends the *Renewable Energy (Jobs and Investment) Act 2017* (Vic) to set new energy storage targets of at least 2.6GW of energy storage capacity by 2030 and at least 6.3GW by 2035.

The SEC's investment, in conjunction with the Act, clearly demonstrates Victoria's commitment to energy storage projects. That commitment is shared by other states and territories, as indicated by the Clean Energy Council's Renewable Projects Quarterly Report for Q4 2023, which found that "2023 concluded as the most successful year on record for large-scale energy storage projects, with a total of 3,949MW/9,095MWh, and AU$4.9 billion worth of investment commitments for the calendar year."

Battery energy storage systems (BESS) are transforming the energy landscape by enhancing the efficiency, reliability and flexibility of power grids, and play a critical role in ensuring a stable and continuous power supply from renewable energy sources.

As such, battery energy storage projects, and the construction risks associated with those projects, are subjects of significant interest for all project participants. This article will briefly explore some of those construction risks from the perspective of a BESS contractor.

Procurement Model

In the BESS market, principals/owners (Principals) will typically procure the project on either a "turnkey" or "split contract" basis.

Under a turnkey contract, the BESS contractor is generally required to design and deliver the completed project to the Principal. For the BESS contractor, the primary risk of that model is that the BESS contractor is required to be a single point of responsibility for the Principal.

Alternatively, the Principal may separate the project into packages for (a) the supply and commissioning of the BESS and (b) the civil and balance of plant (BOP) works. Under this split model, the BESS and BOP contractors are required to integrate their works, and so the following interface risks may arise:

- **Coordination** – The BESS contractor may be required to coordinate its work with the work of the BOP contractor. However, unless there is an interface agreement between the contractors, the BESS contractor will have no direct relationship with, or control over, the BOP contractor. On that basis, a BESS contractor may seek to only accept a "best endeavours" obligation to coordinate.
- **Delays** – Given the physical and functional interfaces between the work of the BESS and BOP contractors, there is a greater risk of either contractor causing delay to the other. It may be prudent for a BESS contractor to seek for the contract to:
  - Allocate the risk of any delay, caused to the BESS contractor by the BOP contractor, to the Principal, who will have a direct relationship with the BOP contractor and therefore will be best placed to control that risk
  - State whether the BESS contractor is liable to the Principal for any delays caused to the BOP contractor (in which case, the BESS contractor may seek for that liability to be included in any cap on the BESS contractor's aggregate liability)
- **Defects and performance guarantees** – The BESS contractor will likely be required to guarantee the performance of, and rectify any defects in, the BESS. However, in circumstances where the BESS contractor is not responsible for the installation of the BESS, it may be difficult to identify the party responsible for any performance issue or defect. On that basis, any performance guarantees should be appropriately split between the BESS and BOP contractors.
- **Property damage and personal injury** – Given the physical interfaces between the work of the BESS and BOP contractors, the BESS contractor will likely be required to indemnify the Principal against liability in respect of damage to property or works, or injury to employees, of the BOP contractor caused by the BESS contractor. The BESS contractor may seek for that indemnity to be included in any aggregate liability cap, except to the extent that it is entitled to be indemnified under a policy of insurance.

Location of BESS

A BESS can be developed on a standalone basis (in which case, it will charge from the grid) or can be co-located with a renewable energy facility, such as a solar farm (in which case, it will charge from the renewable energy facility).

If a BESS is co-located with a renewable energy facility, it is either developed to support an existing renewable energy facility or is developed concurrently with the renewable energy facility.

Where a BESS is developed concurrently with a renewable energy facility, the following interface risks may arise:

- **Coordination and integration** – A BESS contractor will likely be required to coordinate and integrate its work with the work carried out by the facility contractor. On that basis, the coordination risk explored above may also arise and should be appropriately allocated. Further, to avoid disputes, the scope of work should clearly define (for example, in a responsibility matrix) which party is responsible for carrying out the integration works and rectifying any defects in those integration works.
- **Delays** – On the basis that the BESS will need to integrate with the renewable energy facility, there is a risk that either the BESS or facility contractor will cause delay to the other contractor. For example, the BESS contractor may require power from the renewable energy facility to commission the BESS, and vice versa – the facility contractor may require load from the BESS to commission the renewable energy facility. If the provision of power or load is delayed due to one contractor's failure to complete on time, the other may in turn be delayed in completing its work. The BESS contractor may seek for the contract to:
  - Allocate the risk of any delay caused to the BESS contractor by the facility contractor to the Principal, who will have a direct relationship with the facility contractor and therefore will be best placed to control that risk
  - State whether the BESS contractor is liable to the Principal for delays caused to the facility contractor's work and whether that liability is included in any delay liquidated damages or any cap on the BESS contractor's aggregate liability.
- **Property damage and personal injury** – Given the physical interfaces between the work of the BESS and facility contractors, the risk of property damage and personal injury explored above may also arise and should be carefully considered.

Where a BESS is developed to support an existing renewable energy facility, other interface risks may arise and should be addressed in the contract, such as any Principal delay in providing necessary access to the renewable energy facility or loss of revenue because of shutdowns caused by the BESS contractor.

Regulatory Approvals and Licences

Various regulatory approvals and licences will be required to develop a BESS. To avoid disputes, the contract should clearly define which party is responsible for obtaining each of those approvals and licences.

Grid Access

Unless load banks are used, a BESS contractor will require the ability to export power to the grid in order to commission the BESS. Therefore, the contract should clearly define which party:

- Is responsible for obtaining approval to access the grid and export sufficient power to complete commissioning
- Bears the risk of delay in obtaining that approval

Intellectual Property

A BESS will typically comprise, in part, the BESS contractor's proprietary hardware and software. From the BESS contractor's perspective, it may be critical that ownership of the intellectual property in that hardware and software does not transfer to the Principal. Instead, the BESS contractor may seek to grant the Principal a nonexclusive licence to use that intellectual property for the purposes of operating and maintaining the completed BESS.

Performance Guarantees and Warranties

A BESS contractor will usually be required to guarantee minimum performance levels, warrant that the BESS remains free from defects for a defined period of time, and assign to the Principal the benefit of any warranties provided by the manufacturers of the key components of the BESS. Ensuring that the BESS meets performance specifications over its lifespan may not be straightforward, especially under varying operational conditions. The BESS contractor would seek for the guarantee and warranty regimes to be technically achievable and not unreasonably shift project risk to the BESS contractor. The BESS contractor may seek to achieve that object by:

- Ensuring that the performance guarantees are appropriately split between the BESS contractor and any BOP contractor
- Seeking a cap on any liability for performance liquidated damages
- Seeking to limit the Principal's right to require the BESS contractor to rectify the BESS if it fails to meet the guaranteed performance levels
- Ensuring that the warranties are subject to the Principal complying with operating and maintenance conditions
- Ensuring that the warranties account for the degradation rate specified by the battery manufacturer
- Ensuring that the warranty period is not unreasonably long
- Ensuring that the manufacturers' warranties are capable of being assigned to the Principal

Conclusion

Battery energy storage is critical to the decarbonisation of Australia's energy sector in the transition towards a more sustainable energy future. The legal and regulatory aspects of BESS projects can be complex, requiring specialised knowledge and careful navigation. To ensure the success of BESS projects and to avoid the risk of disputes, Principals and contractors should consider, and appropriately allocate, the construction risks arising from those projects.

If you require assistance in navigating these risks, please contact a member of our team.

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