New Queensland Industrial Relations Act

- Steven Lance, Queensland State Manager, BISCOA.

In 1990, the Queensland Government introduced a new Industrial Relations Act into Queensland. Of particular interest and importance is section 17 of the Act which enables employees whose wages remain unpaid for twenty-four hours by an employer to serve the prime contractor (who is supposedly immediately above the employer) with a notice of attachment to secure the wage monies owing.

Section 17 attempts to give to employees a mechanism for recovery of wages similar to the mechanism for the benefit of subcontractors which currently exists in the Subcontractor's Charges Act (Qld), whereby a subcontractor can attempt to charge monies owing by a principal to a builder.

A precis of the more important sections is as follows:

Section 17.2 - Wages are the first charge on monies due to an employer.

This section of the Act sets out that wages due to employees are a first charge on monies due to the employer by the prime contractor in respect of work performed.

Section 17.4 - Monies due or received by employer to be applied in payment of wages due or to become due.

Subsection two of this section sets out that an employer is to apply all such monies received in payment of wages due or payable or to become due and payable to employees employed by the employer.

A further obligation occurs in sub-section three, whereby the employer is to keep a true and full account in writing of all such monies received from the prime contractor and, on application of any employees whose wages are more than eight days in arrears, to produce the account to the employee for inspection and permit the employee to make a copy of the extract from the account.

Section 17.5 - Notice of Attachment

This operative section enables an employee, whose wages remain unpaid for twenty-four hours after they have become due and payable and having been demanded by the employee, to serve the prime contractor with a notice of attachment.

Section 17.6 - Consequences of Notice of Attachment

Within seven days of service of a notice of attachment, the prime contractor is obliged to retain such part of the monies due and payable or to become due and payable to the employer as to satisfy the claim for wages.

At the end of the seven days, the amount claimed must be retained until an industrial magistrate orders to whom the amount is to be paid or orders the withdrawal of the notice of attachment.

Subsection 4 provides that a prime contractor who fails to retain or pay in accordance with subsection 2 is personally liable to each employee in the amount of each employee's claim for wages.

It is important to note that this section is backed up by section 17.9 which provides that, if the prime contractor doesn't retain those monies, the employee may sue the prime contractor direct for the amount that he should have retained.

Section 17.8 - Employees to be paid according to time at which notices of attachment are served

Monies attached in the hands of a prime contractor are to be paid in priority according to the order of service of the relevant notices of attachment. For the purposes of this section, all notices of attachment served within seven days following the service of the first such notice are taken to be served simultaneously, so as to secure an equal priority to distribution of the monies attached.

Accordingly, all employees will be paid simultaneously in full, unless the monies attached are insufficient in which case they are paid on a pro-rata basis.

Section 17-12 - Remedy of Employees of Subcontractor

This section of the Act provides that the same rights and obligations which apply to the prime contractor and employer situation apply to subcontractors. For the purpose of this section, the term employer is substituted for the term prime contractor and the term subcontractor is substituted for the term employer.

Section 17-15 - Industrial Magistrate may hear claim for wages ex parte

Upon proof of service, an industrial magistrate may hear and determine proceedings in respect of a claim for wages, in the absence of any person to whom the originating process is directed .

Section 17-16 - Payment of Wages

Subsection 2 of this section would appear to indicate that employees who perform work for a set price or rate have the same rights under this section as employees under an award.

Conclusions

Section 17 of the Act is most important to contractors and subcontractors as it sets out a clear and precise mechanism for employees to recover wages. Of great interest is section 17.13 of the Act which sets out that, if a prime contractor has paid a claim for wages due to an employee in satisfaction of his own obligations, then it is not taken to be of preference in the case of the winding up or insolvency

of the employer.

Of concern is the way in which the definitions of the various parties are set out in section 17.1. The definitions of employer, prime contractor, and subcontractor are not clear and, whilst this particular section of the Act would appear to have particular application to the construction industry, it seems that the draftsmen of the legislation were casting a wider net; certainly, further work needs to be done to clarify these unwieldy definitions.

A major weakness of the Act is that the door is opened for employees to lodge vexatious or frivolous notices of attachment against employers. Taken to extremes, employees may well be able to hold an employer's cash flow to ransom.

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This legislation highlights the need for contractors and subcontractors to take every precaution to ensure that they are paying the correct award entitlements. Problems frequently arise with workers being underpaid because the correct award has not been identified. In the past, employers have incurred small fines from the courts in cases of underpayments as well as being ordered to pay the correct money.

However, under this legislation contractors and subcontractors are likely to have their cash flow interrupted (potentially seriously) in the case of either underpayment or non-payment of wages.

Insolvency in the Building Industry - South Australian Ministerial Working Party's Report

- **John Tyrril**

In August 1990, the South Australian Ministry of Housing and Construction invited representatives from building industry associations and unions to form a working party to advise on insolvency in the building industry.

The Minister also announced that he would:

- consider all options including trust funds, voluntary insurance, direct payments and bank guarantees;
- consider the abolition of Workers Liens and reform of bankruptcy law so that labour-only subcontractors might be considered as wage earners;
- determine whether different solutions might be appropriate for different sectors of the housing and construction industry, particularly residential and major works construction.

The Working Party comprised representatives from the Construction Industry Advisory Council, the United Trades and Labour Council, the Building Trades Federation and the Housing Advisory Council Industry Committee with representatives from SACON and the Office of Fair Trading as observers.

The Working Party observed that insolvency is not solely a product of the current economic climate and commented that any proposals to reduce the impact of insolvency should not impose significant cost upon the industry or allocate imposts unfairly amongst sectors of the industry.

The Working Party observed that during 1990 a significant number of subcontractors had become insolvent as a direct result of the insolvency of others. Further, that

tractors and suppliers. The Working Party noted that subcontractors have three main options at present following non-payment by contractors; these are to:

- place a lien upon the property of the developer (client);
- seek a civil solution through the courts; or
- absorb the loss.

The Working Party's observation about liens is as follows:

> "Liens in the past have served to delay settlement of disputes by introducing complicated legal solutions and halting work on the project. This reduces the extent of payouts to creditors by introducing a high cost legal process. Liens also, as a general rule, result in another contractor taking over the project at a greater cost, further reducing the funds available to settle existing debt. Liens have no benefit where the developer does not owe payments to the principal contractor. In summary liens are considered likely to reduce the total payout to creditors although one individual creditor may benefit relative to others."

The Working Party noted that there was a developing practice of clients requesting bank guarantees as security against insolvency, as well as non-performance and that this security imposes additional costs upon the industry. The Working Party noted that much of the debate on insolvency had concentrated on the impact upon subcontractors, but the matter was broader affecting clients, head contractors and suppliers as well as subcontractors.

The Working Party expressed a concern that any proposals to overcome the problem of insolvency should not increase the level of regulation in such a way as to