

Security of Payment for Subcontractors - Queensland Discussion Paper

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In November 1991, the Queensland Government issued a Green Paper entitled "Security of Payment for Subcontractors in the Building & Construction Industry - Discussion Paper".

The Discussion Paper's purpose is to explore solutions to the problem of default in payment of subcontractors by head contractors. The Discussion Paper states that it was submitted that over \$50m had been lost by Queensland subcontractors from January 1991, due to payment defaults.

Subcontractors' complaints were not limited to insolvency, but also about "habitual non-payment of final progress payments and retentions" (- a problem which is also not unknown to head contractors).

The Discussion Paper also comments:

"The matter is lent extra urgency by the increasing practice of builders requiring up-front performance bonds (often demanded in cash) of subcontractors."

The Paper has no status other than to provoke discussion; submissions close at the end of February 1992.

Whilst the Discussion Paper is of direct interest to subcontractors concerned about the problem of ensuring payment, it will also be of interest to head contractors, developers and financiers.

The 90 page A4 format Discussion Paper contains the following chapters:

1. The Need for Reform
2. Under Capitalisation And Management Under-Skilling
3. Contracts
4. Trusts And The Alberta Construction Payments Bill
5. Subcontractors' Charges Act
6. Insurance
7. Dispute Resolution
8. Tendering Practices
9. Conclusion

The Paper discusses the problems caused by undercapitalisation, including on the part of subcontractors without the capacity to weather problems, and also the problems which are caused by some industry practices. It comments upon "home brew contracts" and problems caused by "pay when paid" clauses. Importantly, the problems which the industry has experienced with the operation of the Subcontractors' Charges Act are also canvassed.

The Alberta Construction Payment Bill is discussed, as it was proposed by subcontractors as a potential solution to their problems. That Bill proposes the establishment of

a statutory trust scheme, supported by compulsory registration and strong penal sanctions for breaches of trust. The Green Paper comments that the Alberta Bill, with its structure of trusts, might contain an element of overkill for the Australian context.

In the Discussion Paper's Conclusion, it is stated that "the means of securing payment must of necessity be flexible but sound".

The Discussion Paper's key conclusions are as follows:

"The essential proposal of this Green Paper is that legislative recognition should be given to a requirement that builders provide security of payment to subcontractors. Builders could nominate which of a number of options they consider suit their circumstances and that of the relevant project. Once that nomination has been made (to the existing licensing authority), the standard clauses governing that form of security option would be imported into the contracts connected with the project.

By this means builders retain the choice of the mechanism while subcontractors legitimate expectations to be paid can be met.

In brief, the options are:

- proof of payment with third party enforcement rights;
- project insurance;
- a builder trust.

No nomination would be required where managed contracts with direct payment are proposed.

The legislation could resolve further problems by providing for mandatory minimum conditions that contracts be in writing (with basic details stipulated), that, in the absence of further writing, the parties be deemed to have contracted on AS2545 terms, that "pay after paid" clause be void and that all retention monies are required to be held in trust.

...

Underpinning all of the above are the proposals for a more structured system of builder and contractor licensing, reformed tendering processes for state government projects and the repeal of the Subcontractors' Charges Act."

With respect, in these troubled times, consultants and head contractors would also enjoy similar security of payment by developers and financiers. The problem is not limited to subcontractors. □