Petroleum Act 1923 (the Act). About 20 hectares of the 3,225 hectare property of the Sullivans was subject to the appellants' activities.

Respondents Claim

The respondents claimed for compensation in the Land and Resources Tribunal (LRT) based on ss 18, 88 and 99 of the Act. The LRT (constituted by Smith DP) awarded compensation in the amount of $170,682.78 (with various orders as to interest) including amounts of:

- $95,760.00 for injurious affection in respect of the reduced market value of the balance of the respondents' land; and
- $7,245.00 for legal fees incurred in preparation of the respondents' claim for compensation,

which were regarded by the LRT as "consequential damages" under s 99(1)(e) of the Act.

After substantial consideration of the interpretation of s 99(1)(e), the LRT took the view that s 99(1)(e) of the Act was effectively an additional head of compensation and was broad enough to encompass all losses resulting from entry and activity on a property under an ATP or a petroleum lease.

The Appeal Decision

The appellants appealed the decision of the LRT. The issue before the Court of Appeal was whether the respondents were entitled to compensation for injurious affection and legal expenses as "consequential damages" pursuant to s 99(1)(e) of the Act.

Holmes J, in her judgment, considered the compensation regimes under the *Petroleum Act 1915* and the *Mining for Coal and Mineral Oil Act 1912* in addition to the compensation regime under the Act (both as enacted and as amended).

In a unanimous decision,[1] the Court of Appeal held that the language of the Act does not permit a conclusion that injurious affection is embraced in the phrase "consequential damages" in s 99(1)(e) of the Act. The reference to "consequential damages" in s 99(1)(e) must be considered in light of the preceding paragraphs of s 99(1) (and the other provisions of the Act relevant to compensation) and did not of itself confer a separate right to compensation encompassing other adverse effects on land such as injurious affection.

The court also held[2] that legal fees paid in connection with the preparation of a claim for compensation were not properly characterised as damage suffered consequentially upon the occupation of the land by the appellants under the ATP or petroleum leases.

The amount of the compensation was reduced by the amounts of $95,760 and $7,245 and the LRT judgment was varied to reflect the amended compensation total of $67,677.78.

QUEENSLAND MOVES TO INTRODUCE SECURITY OF PAYMENT LEGISLATION*

Introduction

On 26 November 2003, the Queensland Government introduced the *Building and Construction Industry Payments* Bill 2003 (Qld) (Bill) into Parliament. The Bill is substantially similar to the New South Wales security of payment legislation.[1]

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1 Davies JA and Atkinson J agreeing with the reasons and orders of Holmes J.

2 Citing *Minister for the Army* v *Pacific Hotel Pty Ltd* [1944] St R Qd 112 at 122, 123, 129.

* Jay Leary, Solicitor, Freehills.

1 See Legislative Note about the New South Wales Act at p 103 of this Journal.

Security of payment legislation has recently received much attention. Security of payment legislation has already been enacted in New South Wales and Victoria. Western Australia has prepared a draft Bill which it intends to put before Parliament shortly. The Cole Royal Commission recommendations suggest that the Federal Government legislate to nationalise and broaden security of payment legislation (a draft Bill is included as a part of those recommendations).

Object of the Bill

In short, the object of the Bill is to:

- ensure that construction contractors are paid for work properly performed, and
- provide a quick and simplified means to resolve payment disputes and enforce payment rights.[2]

Application of the Bill

The Bill applies to all construction contracts. A construction contract is defined by Sched 2 of the Bill as a "contract, agreement or other arrangement" which provides for:

- "construction work" in Queensland, and
- the supply of "related goods or services" in Queensland.
- A construction contract may be written, oral, partly written or partly oral.[3]
- "Construction work' is broadly defined [4] to include:
- Construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of *buildings* or *structures*.
- Construction, alteration, repair, renovation, maintenance, extension, demolition or dismantling of any works forming a part of land, including:
  - walls
  - road works
  - powerlines
  - telecommunications equipment
  - runways
  - docks
  - harbours
  - railways
  - pipelines
  - wells, and
  - industrial plant.
- Any work which is integral or preparatory to any of the above including:
  - earthworks, tunnelling or boring
  - foundations
  - scaffolding, and
  - prefabrication of components whether carried out on-site or off-site.

As noted above, the Bill also applies to "related goods or services". "Related goods or services" is defined by the Bill to mean:

- goods which are to be incorporated or used in connection with "construction work", and

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2 See sections 7 and 8 and the Minister's second reading speech at pp 5149 and 5150.
3 See section 3 of the Bill.
4 See section 10.

- services which relate to "construction work', including labour, design, architectural and engineering.

The Bill does *not* apply to the following:

- drilling for, or extraction of, oil or gas
- extraction of minerals, including tunnelling or boring
- contracts for domestic building in which a resident owner is a party, and
- finance and guarantee documents.

It is not possible to contract out of the Bill.[5]

Right to Payment

The Bill provides:

- a person who has undertaken work under a construction contract with a right to payment for such work
- a method for valuing work completed where a construction contract does not provide a method for valuation
- a due date for payment or work where a construction contract does not provide a date for payment, and
- interest on late payments.

The Bill makes "pay when paid" clauses invalid (as the *Queensland Building Services Authority Act* 1991 (Qld) (QBSA Act) already does). That is, clauses which make payment from A to B contingent upon a payment first made by a third party to A.

Recovery of Payments and Adjudication of Payment Disputes

A party who claims to be entitled to payment for work undertaken under a construction contract may seek to recover such payment under a process provided for in the Bill.

Simply stated, the process provided for in the Bill is as follows:

- A party who claims to be due payment under a construction contract may serve a "payment claim" on the other party. The payment claim must specify the work undertaken, the amount alleged to be due and that the claim is made under the Bill.
- A respondent to a payment claim must serve a "payment schedule" within 10 business days of receiving the payment claim. The payment schedule must identify the amount which the respondent alleges is due to the claimant, and the reasons for any difference between the payment schedule and payment claim.

  If the respondent fails to serve a payment schedule on the claimant within 10 business days, or if the respondent fails to pay the amount specified in a payment schedule by the date due under the Bill, then the respondent is deemed "liable" to pay such claimed amount or amount specified in the payment schedule. The claimant may then recover such liability as a debt due in a court of competent jurisdiction or through the Bill's adjudication procedure. In addition to creating liability for a debt, the Bill entitles the claimant to suspend work and recover such costs incurred as a result of the suspension from the respondent.
- Where a respondent properly serves a payment schedule and the claimant remains dissatisfied, the claimant may make an application for adjudication.

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5 See section 100.

- Adjudication is commenced by making an application to an authorised nominated authority.[6] The authorised nominated authority appoints a qualified adjudicator.[7] The respondent to an application for adjudication must serve any response to the application within the later of five business days after receiving the application for adjudication or two business days after receiving the adjudicator's acceptance of the application.

  In adjudicating a dispute, an adjudicator may call for submissions, may hold an informal conference of the parties (at which the parties are not entitled to legal representation) or may inspect any work relating to the dispute.

  In making a decision, an adjudicator is to decide the amount due to the claimant (if any), the date on which it is due and any interest owed. An adjudicator must make his or her decision within 10 business days of receiving an adjudication response or such other time as agreed between the parties.

  Failure to pay any amount which an adjudicator decides is due will entitle a claimant to recover such amount as a debt due in a court of competent jurisdiction, and suspend work.

Amendment to the QBSA Act and the *Subcontractors' Charges Act*

The Bill does not affect the operation of the *Subcontractors' Charges Act 1974* (Qld). It does, however, require a claimant for payment to choose whether it will make its claim under the Bill or the *Subcontractors' Charges Act*.

The Bill amends the QBSA Act. Significant amendments made by the Bill to the QBSA Act include:

- deleting the implied terms relating to payment so as to provide consistency between the Bill and QBSA Act
- deleting the need to evidence variations in writing, and
- limiting the notice requirements on setting off to retention moneys and security.

Observations

The Bill is largely concerned with payment issues in the residential and commercial construction industry. However, the Bill is drafted in such a way that it applies to construction work across all industries including energy and resources projects. The lesson to be learnt from the experience of other jurisdictions with similar legislation is that the Bill requires far greater diligence in the administration of contracts. In a similar way to the New South Wales Act, the Bill does not appear to prevent judicial review of decisions of an adjudicator.

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6 Authorised nominated authorities have not yet been appointed. Under the New South Wales Act, authorised nominated authorities include LEADR, the Institute of Arbitrators and Mediators Australia, and the Master Plumber's Association among others.

7 The adjudicator is to be qualified under the terms of the Bill and is to be registered with the adjudication registry.