

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004 (“BCIPA”)

This very useful piece of Queensland legislation which was introduced in 2004 has been very useful to facilitate cash flow in the construction industry so dependent on it. The *flow chart* which is attached outlines the process involved in the parties using BCIPA, and these notes are a guide for you to understand what is required from a claimant and from a respondent.

Payment claim (section 17 of BCIPA)

BCIPA allows a *claimant* who has carried out *construction work or provided related goods and services to construction work* to make a *payment claim* for work done or materials supplied, and serve it on the person who is liable to pay them for this work or materials (the “*respondent*”).

Payment schedule (section 18 of BCIPA)

If the *respondent* wishes to dispute the amount claimed, they must provide the *claimant* with a *payment schedule* within 10 business days (or earlier in some cases) which identifies the *payment claim* and the reasons why the *respondent* does not agree to pay all or part of the *claimed amount* (the “dispute”).

Adjudication (sections 21, 24, 25 and 26 of BCIPA)

If the *claimant* is not satisfied with the reasons given by the *respondent* in the payment schedule, the claimant may apply to have the payment claim *adjudicated* by lodging an application with an Authorised Nominating Authority (“ANA”) who appoints an independent *adjudicator*. The *claimant* must serve the *adjudication application* on the *respondent* to allow them to provide an *adjudication response*.

An *adjudicator* then considers the payment claim and the adjudication application, together with the payment schedule and the adjudication response and makes a *decision* about the *dispute* and decides how much money the claimant is entitled to.

The *respondent* must pay the *claimant* within 5 business days of receiving the adjudication decision, otherwise the claimant may ask the ANA for a certificate of the amount owing under the dispute (including interest), which the *claimant* can lodge with a *Court* (in the Registry) together with an *affidavit* stating that it has not been paid in part or in full; whereupon a *Court* normally enters *judgement* for the unpaid amount. This will immediately affect the *credit status* of a respondent, and it can be seriously inconvenient to have this changed.

Summary judgement in Court/adjudication

If a *respondent* does not serve a *payment schedule*, then on the *due date for payment*, the respondent is required to pay the claimant the *claimed amount*. If it does not do so, then a *statutory debt* is created, and a claimant can go to *Court* seeking *summary judgement* of that statutory debt. Generally speaking, claimants filed an originating application in a *Court*. The disadvantage for a *respondent* in such circumstances is that it is unable to raise any defences against the debt under the contract, and also cannot also raise any counterclaim.

If the *claimant* does not want to go to Court for summary judgement on its unpaid amount, it can elect to go to adjudication, but it must give the *respondent* one further opportunity to provide a *payment schedule*.

In addition, even if a *respondent* provides a *payment schedule*, and then does not pay some or the full amount on the *due date for payment*, a *claimant* may go to court seeking summary judgement for the unpaid amount. Alternatively, the *claimant* could seek *adjudication* on the unpaid amount.

There are many *definitions* and *very strict time limits* under BCIPA that the parties must fit within and adhere to, and an *adjudicator* also has to comply with strict time limits. These time limits emphasise the fact that it is a rapid dispute resolution process for interim payment claims.

Adjudication is a rapid decision-making process to facilitate cashflow in the industry, and adjudicators are only required to get a reasonable answer in the circumstances. Setting aside adjudication decisions is complex and requires approaching the Supreme Court quickly.

Some observations as a solicitor for claimants and respondents and as an adjudicator

Having assisted claimants and respondents using BCIPA since 2005, and as an adjudicator involved in a range of claims from a few thousand dollars to tens of million dollars, may I suggest some (but by no means all) important things to keep in mind.

Claimants

Payment Claim

1. make sure your payment claim sufficiently identifies the construction work (i.e. by listing or cross referencing to other documents that you attach) that you're claiming for;
2. make sure that the payment claim is endorsed with the words, "This is a payment claim under the Building and Construction Industry Payments Act 2004";
3. make the payment claim easy to follow, and organise it logically and tabulate it and index it, and provide supporting documents, photographs, calculations et cetera, if they are available and necessary to support your claim;
4. preferably provide more information in the payment claim rather than less, because it may allow the respondent to understand your claim AND PAY YOU; and otherwise it makes it easier in assembling your future adjudication application;
5. however, I am not suggesting that you have to obtain and attach expert reports supporting your payment claim at this stage, because, after all, YOU MAY GET PAID and may therefore have wasted this money. (However, you may wish to obtain these reports to give you some comfort about your claim, but that is your choice). Another reason for not providing the expert reports at this stage, is that you give the respondent an advantage in being able to attack those expert reports in the payment schedule, and alerts them to the sort of expert reports they will need to obtain, and it may narrow what you can say in an adjudication application too much at this stage;
6. keep a record of how the payment claim was served, because in adjudication and in court proceedings you need to be able to demonstrate that it was served. Your contract may identify how one can serve notices; however, hand delivery or facsimile (if it's only a small amount of documents) are otherwise best because you can easily prove service. However, if the parties have been emailing one another throughout the contract, then service by email may be sufficient.

Adjudication

7. in any adjudication application, make it easy for the adjudicator to follow your payment claim and submissions, because adjudicators have to get across a whole lot of issues very quickly, and the easier you make it for them, the more likely it is that the adjudicator understands your case. A good summary of the dispute, with simple supporting documents are very useful. Sketches, photo's & overviews are invaluable;
8. provide submissions (explanation as to why you're entitled to your claim) and cross reference them to the documents. There is nothing more annoying to an adjudicator if they've got a try and work out where documents supporting your case can be found, and having to work out what what your case is really about;
9. you should also provide legal submissions, if they are necessary, as well as copies of court cases in support of those submissions to save the adjudicator having to go and look for the cases. Remember an adjudicator cannot make a decision based on issues that have not been raised by the parties. If an issue emerges from the facts, that neither the claimant and respondent have made submissions about, the adjudicator cannot decide based on those issues, unless they seek submissions from the parties before deciding the merits of the dispute, and this delays the adjudication process;
10. be ready therefore, for an adjudicator asking for additional submissions;
11. make sure you follow the time limits provided in BCIPA, as time limits need to be strictly adhered to under BCIPA.

Respondents

Payment Schedule

1. make sure that you serve a payment schedule within time (generally 10 business days), and provide every possible legitimate reason for non-payment, because you are limited to those reasons in your adjudication response;
2. keep a record of how the payment schedule was served, because in adjudication and in court proceedings you need to be able to demonstrate that it was served, particularly if you want to defeat a summary judgement claim. Your contract may identify how one can serve notices; however, hand delivery or facsimile (if it's only a small amount of documents) are otherwise best because you can easily prove service. However, if the parties have been emailing one another throughout the contract, then service by email may be sufficient;
3. if there is likely to be a significant dispute, engage experts to assist in the development of the payment schedule, as you have a bit more time at this stage (normally 10 business days) compared to the 5 business days that you given to provide an adjudication response;
4. pay whatever amount you agree to pay by the due date for payment;
5. provide an adjudication response & submissions (including experts' reports if you gave a schedule) whether or not you have provided a payment schedule. In the event that you did not provide a payment schedule and the claimant goes to adjudication, you will generally be limited in your adjudication response to jurisdictional issues about the payment claim and the adjudicator's powers, and not the details of why you are justified in non-payment;
6. in the event you are defending a summary judgement application in court, your focus should be on the validity of the payment claim and its service and other high-level jurisdictional points, because you are not entitled to raise defences under the contract, nor in being entitled to counterclaim.
7. See the adjudication issues (paragraphs 7 to 11) under **Claimants** above.