

## QUEENSLAND SET FOR WIDE-RANGING REFORMS TO ADJUDICATION PROCEDURES UNDER SECURITY OF PAYMENT LEGISLATION

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### IN BRIEF

The Queensland government has approved wide-ranging reforms to the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA). The reforms are set to be debated in parliament mid-year, with the changes likely to apply to construction contracts entered into after 1 September 2014.

### REFORMS DESIGNED TO ADDRESS SHORTCOMINGS IN CURRENT SYSTEM

The reforms are designed to address a number of concerns with the current legislation which were identified from a widespread industry-focused review of BCIPA carried out by government in 2013.

One concern is the imbalance between the interests of claimants and respondents, in particular the short time limits applying to the service of payment schedules and adjudication responses, compared to those applying to payment claims and adjudication applications.

Another concern identified by the review is that the 'one size fits all' approach is inappropriate for large and complex claims.

The review also found that a shortcoming of the current system is that disputes are being decided by adjudicators with inadequate expertise and experience. A number of reforms have been approved by cabinet.

### SINGLE ADJUDICATION REGISTRY TO BE CONTROLLED BY QBCC

Authorised Nominating Authorities (ANAs), the private organisations which currently accept adjudication applications and appointed adjudicators, are to be abolished and replaced by a single adjudication registry controlled by the Queensland Building and Construction Commission (QBCC).

### QBCC TO MONITOR PERFORMANCE OF ADJUDICATORS

The benchmark for the skills and qualifications of adjudicators will be raised and there will be compulsory continuing professional development for adjudicators. The QBCC will monitor the performance of adjudicators, including the fees they charge, and will appoint adjudicators based on an internal system of grading based on experience and other relevant factors.

### MORE TIME TO RESPOND TO PAYMENT SCHEDULES AND ADJUDICATION APPLICATIONS

### PAYMENT CLAIMS TOTALING LESS THAN \$750,000

The time for a respondent to serve a payment schedule in response to a payment claim for less than \$750,000 will remain at 10 business days (unless the

construction contract provides a shorter period, in which event the shorter period will apply). However, in an adjudication of a payment claim for less than \$750,000, a respondent will have 10 business days to respond to the adjudication application, instead of the current five business day time limit.

### 'LARGE OR COMPLEX' PAYMENT CLAIMS

Payment claims totalling more than \$750,000, or payment claims involving latent conditions claims or time related claims will be regarded as 'large or complex' payment claims and:

(a) the time for a respondent to serve a payment schedule in response to such a payment claim will be extended from 10 business days to 15 business days; and

(b) in an adjudication of such a payment claim, a respondent will have 15 business days to respond to the adjudication application, instead of the current 5 business day time limit (which may be extended a further 15 business days by adjudicators).

### PAYMENT CLAIMS SERVED MORE THAN 91 DAYS AFTER THE REFERENCE DATE

For claims served more than 91 days after the reference date, respondents will have 30 business days to serve a payment schedule.

### NEW REASONS FOR DISPUTING PAYMENT CAN BE INCLUDED IN ADJUDICATION RESPONSE

It is proposed that respondents who do not provide adequate reasons in the payment schedule will be penalised with a costs award against them by the adjudicator.

## TIME LIMITS FOR SERVING PAYMENT CLAIMS

Payment claims will need to be served within six months after the construction work was last carried out, instead of the current 12 month time limit (unless the contract provides for a longer period or the payment claim is in relation to the final progress payment, in which case it must be served within 28 days after the expiry of the defects liability period).

## RECOGNITION OF INDUSTRY SHUTDOWN OVER CHRISTMAS AND NEW YEAR

The definition of 'business days' will exclude the three business days before Christmas and 10 business days after new year's day to reflect the industry shutdown period.

## ASPECTS OF THE BCIPA THAT WILL REMAIN THE SAME

At this stage, it appears that the following aspects of BCIPA will remain unchanged, even though they were considered by the government as part of its review of the regime.

(a) BCIPA will continue to apply to construction work carried out on mining sites.

(b) Payment claims will still need to state they are made under BCIPA to be valid (unlike in NSW from 21 April 2014).

(c) Payment claims will not need to be supported by statutory declarations (again, unlike in NSW from 21 April 2014).

(d) BCIPA will not apply to residential construction work.

(e) BCIPA will not enable subcontractors to claim charges on monies owed to the respondent by the principal or a contractor

further up the contractual chain (unlike in NSW and Victoria). Subcontractors will continue to be required to make an election between pursuing a claim under BCIPA or the *Subcontractors' Charges Act 1974*.

(f) There will be no limit to the size of claims made under BCIPA.

(g) 'Purchasers' (i.e. principals and head contractors) will not be able to make claims against contractors down the contractual chain.

(h) Claimants will continue to be able to make claims for disputed variations of any size and claims involving latent conditions or time related costs (unlike in Victoria).

(i) Claimants will continue to be able to apply directly to court for summary judgment for the amount claimed if a respondent does not serve a payment schedule within the required time.

(j) Adjudicators will still not be able to order the return of bank guarantees.

## REFORMS AIM TO REDUCE INCIDENCE OF AMBUSH CLAIMS

The main impact of the reforms will be to even out the playing field between claimants and respondents. The reforms will make it more difficult for claimants to launch 'ambush claims', which is currently a common practice.

An ambush claim is when a claimant spends considerable time preparing a large amount of material in support of its claim, which the respondent then only has five business days to respond to. The new time limits will provide some relief to respondents, particularly in large and complex claims.

## ABOLITION OF AUTHORISED NOMINATING AUTHORITIES SHOULD PROMOTE UNBIASED DECISION MAKING

Abolition of ANAs will also have a big impact. Currently, claimants can pick and choose their preferred ANAs and adjudicators arguably have a commercial interest in making decisions favourable to claimants, as it is more likely to lead to further work.

Provided claimants are not able to select their adjudicators, having a central registry of adjudicators whose appointment is controlled by the QBCC should eliminate any perceived conflict of interest or bias in this regard.

We will continue to monitor the progress of the reforms and provide updates on any major milestones.

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