

REPEAL AND REPLACEMENT OF THE BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004 (BCIPA)

BUILDING INDUSTRY FAIRNESS



KEY TAKEAWAYS:

- 1 These changes will commence on 17 December 2018.
- 2 A payment claim will no longer be required to state that it is made under legislation.
- 3 Crucial that respondents to payment claims issue payment schedules:
 - (a) on time;
 - (b) which outline all reasons for withholding payment.
- 4 If a respondent does not provide a payment schedule in response to a payment claim, the respondent will not be allowed to give an adjudication response in the event an adjudication is commenced.
- 5 In the event the dispute proceeds to adjudication, respondents who provided a payment schedule will not be allowed to include new reasons for withholding payment in the adjudication response that are additional to what was included in the payment schedule.
- 6 The Regulations to the Act prescribe limitations on submissions and accompanying documents for adjudication applications and adjudication responses.
- 7 Claimants will have more time to make an adjudication application.
- 8 Definition of 'Reference Date' amended.

The *Building Industry Fairness (Security of Payment) Act 2017* (the **Act**) provides for the repeal of BCIPA, with the provisions of BCIPA to be replicated, subject to amendment, in the Act. The provisions of BCIPA provide for the management of payment disputes, and the amendments provided for in the Act are favourable to subcontractors considering bringing a claim in relation to payment.

1 KEY AMENDMENTS

Two of the key changes to the BCIPA provisions relate to how payment claims are to be made, and the extension of timeframes for claimants to apply for adjudication.

1.1 PAYMENT CLAIMS

The government has sought to ease the way for payment claims to be made by subcontractors by:

(a) Amending the definition of "payment claim"

- (i) The requirement to endorse a payment claim as being made under BCIPA has been removed. The definition of "payment claim" has been amended to refer to a written document that:
 - (A) identifies the construction work to which it relates;
 - (B) states the claimed amount of progress payment;
 - (C) requests payment of the claimed amount (the Act specifies that a written document bearing the word 'invoice' will satisfy this requirement); and
 - (D) includes any other information prescribed by regulation.
- (ii) Amending the definition in this manner means that an invoice issued by a claimant which identifies a due date for payment, as well as meeting the other criteria set out above, could operate as a "payment claim" for the purpose of the Act.

(b) Tightening the requirements on respondents

- (i) The obligation to provide a payment schedule on time; and
- (ii) Removing the opportunity for respondents to issue a second chance payment schedule.

Payment claims and schedules

A respondent must respond to a payment claim giving the claimant a payment schedule before the earlier of:

- (i) the expiry of the response period under the contract (if any); or
- (ii) 15 business days after the payment claim is given to the respondent.

A respondent to a payment claim is not required to give a payment schedule, if it pays the full amount claimed on or before the due date for the progress payment to which the payment claim relates.

If, however, the respondent does not agree, in full or in part, with the amount claimed by a subcontractor, it will be imperative that the respondent issue a payment schedule in response to payment claim on time, which outlines any and all of the reasons for withholding payment. The Regulations may mandate other information to be provided in a payment schedule. However, the Regulations do not currently do so.

Failure to provide the payment schedule on time will also render the respondent liable to a penalty of 100 penalty units (\$13,055 for individuals and \$65,275 for a body corporate), and is a ground for disciplinary action to be taken against the respondent under the *Queensland Building and Construction Commission Act 1991*.

If payment is not made, the claimant may either recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant in court, or commence an adjudication of the payment claim.

A payment schedule, if provided, will need to be a 'complete' response, setting out all reasons a respondent may have for withholding payment. Respondents will not be allowed to include any new reasons in an adjudication response for withholding payment that were not included in the original payment schedule given to the claimant even for "complex payment claims" for over \$750,000 (excluding GST) (or if a greater amount is prescribed by regulation, for the amount prescribed).

Response submissions for adjudication

The second chance provisions under BCIPA for a respondent to issue a payment schedule have been removed from the Act, and if adjudication of the payment claim is commenced and a respondent did not provide a payment schedule in response to a payment claim, the respondent will be precluded from giving an adjudication response.

The Regulations prescribe limitations on submissions and accompanying documents for payment claims of \$25,000 or less. Submissions must not exceed 10 pages, use font that is at least size 10 and have margins of at least 2.54cm. Submissions may only be accompanied by the following documents:

- the payment claim to which it relates;
- the construction contract to which it relates;
- the payment schedule given in response to the payment claim;
- any document that had been given by one party to the other that supported either the payment claim or payment schedule;
- a document given by one party to the other that is related to the construction contract;
- an expert report related to the payment claim; and
- a statutory declaration related to the payment claim.

In the event that any prescribed limitations are exceeded, adjudicators may disregard the adjudication application or adjudication response, to the extent that the submissions or accompanying documents contravene any limitations identified in the Regulations.

1.2 TIMEFRAMES TO APPLY FOR ADJUDICATION OF DISPUTES

The Act also extends the timeframes within which an adjudication application may be made by a claimant, however, the existing timeframes for a respondent to submit an adjudication response have remained the same.

Comparison of timeframes for making adjudication application

Type of application	Timeframe under BCIPA	Timeframe under Act
Application relating to failure to give payment schedule and pay the full amount stated in payment claim	10 business days after the date the respondent to serve the payment schedule	30 business days after the later of the following: a) the day of the due date for the progress payment to which the claim relates; or b) the last day the respondent could have given the payment schedule.
Application relating to a failure to pay the full amount stated in the payment schedule	20 business days after the due date for payment	20 business days after the due date for the progress payment to which the claim relates
Application relating to amount stated in the payment schedule being less than the amount stated in the payment claim	10 business days after the claimant receives the payment schedule	30 business days after the claimant receives the payment schedule

As a result, the period within which respondents must factor the uncertainty of whether an adjudication application will be made, into their business decisions, has been extended.

1.3 OTHER AMENDMENTS TO WATCH OUT FOR

Some other key amendments that have the potential to impact upon contract and dispute administration include:

- (a) A useful clarification to the definition of “reference date” so that in the event of termination of a contract which does not provide for (or purports to prevent) the reference dates surviving termination, the final reference date for the contract will be the date of termination.
- (b) That a progress payment for a construction contract which either does not provide a date for payment or otherwise contains a void payment provision (such as a pay when paid provision) will become payable at the end of 10 business days after a progress claim is made in accordance with the provisions of the Act.
- (c) In deciding the fees payable by the claimant and respondent to an adjudication, the adjudicator must consider the conduct of both parties to the adjudication, and may consider a number of other factors, including the reasons given by the respondent for not making the progress payment the subject of the adjudication application.

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