



Australian Institute of Building Submission to the *Discussion Paper on Payment dispute resolution in the Queensland building and construction industry*

Introduction

The Australian Institute of Building (AIB) welcomes the opportunity to respond to the *Discussion Paper on Payment dispute resolution in the Queensland building and construction industry*. The AIB is keen to see more efficient and thorough security of payment legislation, and welcomes this review.

Vision

The vision of the AIB in regards to this review is to ensure that:

- The building sector in Queensland is improved through higher educational standards;
- The building industry is a viable and growing sector for the benefit of the state, consumers and builders; and
- Builders and sub-contractors are informed, educated and provided with adequate legislative protection and support, to reduce payment disputes.

The questions from the discussion paper will be answered in order.

Question 1: Do you think the jurisdiction of BCIP Act should be reduced to specifically exclude payment claims for some types of work or work over a stated value? If so, what should be excluded?

All aspects of building work should be covered by the BCIP Act. No industry should be excluded, and nor should mining be excluded. Security of payments legislation should also be considered to cover residential home building.

There should be no limits on payment claims for some types of work, or work over a stated value. There is not a problem on limiting the value, but bringing in extra things into a claim can be an issue. It would be difficult to have value limits, and still have the BCIP Act designed for what it was intended to do, which was to allow contractors & subcontractors to have access to timely adjudications and cash-flow.

In general, the current BCIP Act has minimal impact on clients and contractors (in the contractual chain) that administer their contracts properly.

Question 2: Do you think that the respondent needs to be more clearly identified in the contract in relation to who should receive a payment claim under the BCIP Act?

Yes, the parties in the claim should be clearly identified in the contract. Where a party is an individual it is clear, however if one party is a corporation, then it would provide better clarity for a corporate position (such as a director) to specified in the contract for service of BCIP ACT claims and notices. The current legislation can be problematic for large corporations.

A place for payment should also be identified in the contract.

Question 3: Do you believe that the BCIP Act should allow other types of payment claims, including claims by purchasers, to be subject to adjudication? If so, what changes would you suggest?

The BCIP Act should not allow other types of payment claims, including claims by purchasers, to be subject to adjudication. AIB believes that the Queensland system and the BCIP Act works quite well as it currently is. Claims made by purchasers are different, so they would need a different system and different legislation. The BCIP Act is designed to be simple for subcontractors. There is no need to claim down the contractual chain, unless the work is defective. However, standard contracts include a clause for sub-standard work to be rectified. Claiming down the contractual chain would not improve the intent of the legislation. Builders should thus not be able to claim against subcontractors under the BCIP Act.

Question 4: Should the BCIP Act be amended to allow an adjudicator to direct payment in favour of the respondent for an amount greater than the claim?

Generally, AIB believes that BCIP Act should not be amended to allow an adjudicator to direct payment in favour of the respondent for an amount greater than the claim on the basis that the claim is the subject of adjudication and the adjudicator's decision with respect to the value of the claim should range between the value of the claim (subject only to correction of arithmetic errors) and nil.

Further, where the contract allows for debts owed by the claimant to the respondent, the maximum reduction of a claim should be permitted to be a nil payment under adjudication.

Question 5: Do you believe the type of payment claim under the BCIP Act should be restricted?

Claims should generally not be restricted in type but there are some timing issues related to proper contract administration as noted below. If the type of payment claim under the Act is restricted, the BCIP Act starts to be dismantled and loses effect.

If so should payment claims under the BCIP Act be restricted to:

- **contract price for the work;**
- **any other rates or prices stated in the contract; and**
- **any variation agreed to by the parties of the contract by which the contract price, or any other rate of price stated in the contract, is to be adjusted by a specific amount; and**
- **the estimated cost of rectifying any defects in the work?**

Due to the answer in the first part of Question 5, these questions are largely not applicable. However,

there is an issue related to the question, being the improper use of the BCIP Act through the practice of commonly known 'ambush' claims – see answer under Question 10.

Question 6: Should BCIP Act be expanded to allow adjudicators to require the release of a security, such as a bank guarantee?

The BCIP Act should be expanded to allow adjudicators to require the release of a security, such as a bank guarantee. This is especially true if it is a part of the claim, and that is what the claim is about, then the adjudicator should be able to give adjudication whether a security is released or not.

Question 7: Should claimants be required to reference BCIP Act on payment claims if they want to be entitled to rely on the BCIP Act?

AIB is of the view that the BCIP Act should apply regardless of whether the Act is referenced on the invoice, and the legislation should not be subverted because the Act has not been referenced on the invoice. However, generally it is now common practice to reference the Act on invoices, and in all but a very small number of cases, payments are made within 10 days.

Question 8: Do you consider the current process of authorised nominating authorities appointing adjudicators appropriate? If not, what alternate system would you propose?

Rather than the current process of authorised nominating authorities chosen by the claimant appointing adjudicators, AIB would prefer a consensus approach where both parties agree on an adjudicator. This would reduce perceptions that authorised nominating authorities chosen by the claimant have a tendency to appoint adjudicators which have a history of making decisions in favour of the claimant. Thus, it would be the same as under as AS4000 contract, where both parties agree. The Institute of Arbitrators or similar, rather than the Government, should appoint an adjudicator if one cannot be agreed upon.

Question 9: Do you believe that the timeframes for the making of and responding to claims under the BCIP Act are appropriate? If not, how could the timeframes be changed or otherwise improved? In considering this issue you may also wish to consider whether the provisions under the BCIP Act are adequate for the Christmas and Easter periods?

There is widespread agreement in the industry that 10 business days is not sufficient for large complex claims. AIB advocates a sliding scale of time to respond to a claim, depending on the amount of time after the work was completed that the claim is lodged, and the value of the claim – see Appendix 1. Further, AIB believes that the 12 month period in which claim can be made needs to be amended, and that 6 months would be preferable. AIB understands that there is under the BCIP Act a provision that the Christmas and Easter periods cannot be included in 10 business days to respond to a claim. AIB also understands that the timeframes were extended last year, but industry still feels that they are not sufficient. Respondents can go to an adjudicator and have time extended, and in a system where both parties can agree on the adjudicator, the theoretically impartial adjudicator should agree on a reasonable timeframe.

Question 10: Do you believe the BCIP Act allows persons who carry out construction work or supply related goods and services to serve large and complex payment claims in an untimely and unfair manner?

AIB is of the view that the BCIP Act does allow persons who carry out construction work or supply related goods and services to serve large and complex payment claims in an untimely and unfair manner. There is an issue related to the question, being the improper use of the BCIP Act through the practice of commonly known 'ambush' claims whereby claims for variation, and contractual claims are submitted for the first time with a progress claim under the BCIP Act. AIB suggests prohibiting this practice by placing a precedent requirement on the claimant to have submitted variation and other claims (effectively other than original works) to the respondent and a period (for example, of 10 business days for submitted values up to \$1 million and 30 business days for submitted values over \$1 million), expired before such works can be included in a BCIP Act claim. [See Appendix 1 for another possible system.] This will provide the respondent will a reasonable period of time to make a proper assessment prior to the commencement of the current BCIP Act process. Ideally, claims should be submitted to the recipient with a minimum of 30 business days if it is a large and complex claim.

If so, are changes necessary to address this and what should they be?

This point is subject to rigorous debate in the industry at the moment. Most contracts are prefaced on a 12 month defect liability period. The impartiality of the adjudicator is crucial to making a fair judgement on extra time to respond. There is the potential for abuse, and some subcontractors make a living by taking jobs at very low prices and then making very large claims, knowing they will be awarded some amount. Further objective analysis of figure 6 in the discussion paper would perhaps allow this question able to be answered more fully. Again, please see Appendix 1.

Question 11: Should the BCIP Act allow claimants, at the lodgement of an adjudication application, to place a charge on monies owing to a respondent head contractor by a principal?

AIB is of the view that the BCIP Act should not allow claimants, at the lodgement of an adjudication application, to place a charge on monies owing to a respondent head contractor by a principal. Legislation under the Subcontractors Charges Act currently allows claimants to do that. A trust account is not necessary. A beneficiary of the BCIP Act should not be able to also make a claim under the Subcontractors Charges Act. The Subcontractors Charges Act can currently put a 'lien' on the title deed – the bank first and then other creditors. The BCIP Act is designed to make quick adjudications, and allowing claimants, at the lodgement of an adjudication application, to place a charge on monies owing to a respondent head contractor by a principal, could mean uncommercial outcomes where no one gets paid, and could stop the cash-flow.

Question 12: Is security of payment an issue for retentions? If so, how do you think this could be improved?

Security of payment is an issue for retentions, but generally the retention system needs to stay as it is. As the contract value is adjusted, so too the retention value is adjusted, as is the progress claims. There is always the issue that it could be held jointly or by a third party, and a trust account system may work, such as exist for real estate agents and solicitors. Retentions are more of an issue for post-practical completion, and it is more likely that the final payment will be a security of payment issue, which could perhaps be held in trust. Smaller builders sometimes use this to fund their next job, which is not fair on subcontractors. Many building companies have bank guarantees anyway.

Stricter enforcement of retentions would probably force builders to have more cash retention, and to set higher margins to compete with returns from investment funds. It could also encourage smaller companies compete with larger companies by having more sustainable margins. Under the BCIP Act,

retention amounts were recently increased. If the times for retentions need to be extended, they should be done by agreement, which again depends on the impartiality of the adjudicator.

Question 13: Do you believe that some respondents are misusing the legal process by commencing Supreme Court proceedings to delay the payment of an adjudicated amount?

AIB believes that some respondents are misusing the legal process by commencing Supreme Court proceedings to delay the payment of an adjudicated amount.

If so, what if any changes to the BCIP Act should be made to help address this issue?

AIB suggests that the payment must be made, and then subsequently taken to Supreme Court if needed. Otherwise the purpose of the Act is defeated, and measures that frustrate the time period should not be allowed.

Question 14: Are there any other issues you wish to raise in relation to the effectiveness of the BCIP Act process or the jurisdiction of BCIP Act?

AIB advocates a nationally consistent security of payments system and legislation, and incorporating the provisions into the BCIP Act and/or a national act. Further, the Subcontractors Charge Act should be repealed and the provisions of that included in the BCIP Act, and/or national security of payments legislation.

AIB would also like to highlight the need for adjudicators with high levels of expertise and impartiality to ensure fair and reasonable judgements. If no agreement on adjudicator, then one would be appointed by the person in charge of adjudicators who chairs the panel. This person makes sure that the skills of adjudicators are up to the required level, and any complaints against them are addressed.

'Ambush claims' are also an important issue to be addressed.

Question 15: Would you support the making void of any unreasonable timeframes for notification of extension of time requests within contracts?

AIB believes that 10 business days are sufficient. However, ideally subcontractors should be professional businesspeople who sign contracts that they are comfortable with.

If a minimum timeframe was set by legislation how many business days do you believe are reasonable for an extension of time request?

If a minimum timeframe was set by legislation, 21 calendar days are reasonable for an extension of time request. However, as stated above, ideally subcontractors should be professional businesspeople who sign contracts that they are comfortable with, and what is in the contract should apply.

Question 16: Would you support the making void of any unreasonable timeframes for notification of variations within contracts?

Yes, AIB does support the making void of any unreasonable timeframes for notification of variations

within contracts. Although again, as stated above, ideally subcontractors should be professional businesspeople who sign contracts that they are comfortable with, and what is in the contract should apply.

If a minimum timeframe was set by legislation how many business days do you believe are reasonable for a variation to be lodged?

If a minimum timeframe was set by legislation, AIB believes that 20 business days are reasonable for a variation to be lodged.

Question 17: Would you support making void a provision in a construction contract which entitles a purchaser to terminate a contract for convenience? Alternatively, do you believe that all construction contracts should provide for a party to be able to claim for loss of profit when a contract is terminated for convenience by the other party?

Yes, a builder should be entitled to loss of profit when a contract is terminated for convenience by the other party. However, 'necessity' would be a better legal term in the Act that 'convenience' as a reason for termination of a contract. Some clients may be forced into receivership if a contract is not terminated, and in these circumstances, termination is reasonable. Further, generally in Australian Standards contracts, there is a provision for loss of profit and/or costs. If this is amended in the contract, by law this must be highlighted. However, generally the provisions in a contract should apply, and people should undertake diligent contract administration and manage their business and contracts properly.

Question 18: Do you believe that the BCIP Act requires an amendment to specifically address preconditions and other contractual provisions which purport to unreasonably and unfairly restrict the application of BCIP Act?

AIB suggests legal input to review of the Act of those provisions which purport to restrict the provisions of the Act. Preconditions should not be allowed that override the Act, and the Act should override the contract if need be. The BCIP Act must not be undermined by preconditions and other contractual provisions.

If so:

- **what do you consider to be unreasonable and unfair preconditions and what approach do you believe should be taken to address such preconditions?**
- **do you believe adjudicators should be given the statutory power to declare such contractual provisions void?**

AIB suggests that legal advice could also assist with these questions. AIB believes that adjudicators should be given the statutory power to declare such contractual provisions void. Contracts should not contain 'pay when paid' clauses, where one contract is dependent on another, and the BCIP Act prohibits these.

Question 19: Do you have any concerns about a legislative amendment being made to the BCIP Act to make clear that a statutory declaration attesting to the payment of workers, subcontractors and sub-subcontractors is a valid

precondition to the submission of a payment claim?

AIB agrees with a legislative amendment being made to the BCIP Act to make clear that a statutory declaration attesting to the payment of workers, subcontractors and sub-subcontractors is a valid precondition to the submission of a payment claim. Any progress claim should be accompanied by a statutory declaration under law, and has already been a condition in Government contracts in Queensland. Most other contracts also have the necessity of a statutory declaration with a progress claim. However, AIB has some concerns that false declarations may be made if people are desperate, and some consideration is necessary to deal with these circumstances.

Further Information

For further information, please contact the AIB Chief Executive Officer or Policy & Advocacy Manager on (02) 6247 7433 or ceo@aib.or.au or policy@aib.org.au

Appendix 1

Number of days claim lodged after completion	Number of days to assess claim
30 – 60	10
60	20
90	25
120	30
150	35
180	40
210	45
240	50
270	55
300	60
330	65
360	70

Value \$ million	Extra number of days to asses claim	Total number of days to asses claim
0.5-1.0	5	15
1.0-1.5	10	20
1.5-2.0	15	25
2.0-2.5	20	30
2.5-3.0	25	35
3.0-3.5	30	40
3.5-4.0	35	45
4.0-4.5	40	50
4.5-5.0	45	55
5.0-5.5	50	60
5.5-6.0	55	65
6.0-6.5	60	70

Appendix 2

About the AIB

Founded in 1951, the AIB is the peak body for building and construction professionals, acknowledged for its ability to bring individuals together who share a common interest in improving the standing of the building profession and their career within Australia and overseas.

The AIB is incorporated by Royal Charter and is the pre-eminent professional body for building professionals in Australia and the Asia-Pacific region.

Recognised as the accrediting body for building and construction degrees at educational institutions, the AIB has a long and proud history of supporting and servicing the building profession. For more than sixty years, the Institute has worked with the building and construction industry, government, universities and allied stakeholders to promote the building profession, support the development of university courses in building and construction whilst promoting the use of innovative building techniques and a best-practice regulatory environment.

AIB is proud of its role in promoting the exchange of information amongst individuals and accomplishes this through publications including the *Construct* magazine and the Australasian Journal of Construction Economics & Building (AJCEB).

The AIB also has an extensive continuing professional development program in Australia and overseas and facilitates the annual AIB Professional Excellence in Building Awards Program.

For further information please go to www.aib.org.au