

An aerial photograph of a river delta, likely the Fraser River, showing a dense green forest on the left, a green field in the middle, and a wide, light-colored sandy delta with a blue river channel at the bottom. A large white arrow points from the left towards the center of the image.

Allens' Response to the QBSA's Discussion Paper on Payment Dispute Resolution in the Queensland Building and Construction Industry

➤ Allens' Response to the QBSA's Discussion Paper on Payment Dispute Resolution in the Queensland Building and Construction Industry

The following are comments and suggestions by Allens for improving the operation of the *Building and Construction Industry Payments Act 2004* (the **BCIP Act**), in response to the Discussion Paper issued by the Queensland Building Services Authority.

By way of preliminary comment, Allens (and its predecessor Allens Arthur Robinson) has been actively involved in advising both claimants and respondents of their rights and obligations under the BCIP Act since its inception. This involvement has included preparing and responding to adjudication applications, and representing parties in numerous court hearings involving adjudicators' decisions. Our comments and suggestions are based on this experience and are intended to present a bipartisan view focused on improving the certainty, efficiency and fairness of the procedures given effect to by the BCIP Act.

Section 2 – Consultation Questions

Application of the BCIP Act to construction work

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?

It is our view that:

- (a) The object and intention of the BCIP Act is well described, both in the BCIP Act itself and in various judicial decisions on its provisions.
- (b) Ultimately, if amendments are made which exclude payment for certain types of work from the ambit of the BCIP Act, those amendments need to ensure the object of the BCIP Act is still met. This will be achieved by ensuring any new definitions or exclusions are clear and unambiguous.
- (c) The current exclusion with respect to the mining industry is narrow in scope and has been the subject of recent judicial interpretation and should be clarified in the BCIP Act.
- (d) Both the *Housing Grants, Construction and Regeneration Act 1996* (UK) (the **UK Act**) and the *Construction Contracts Act 2004* (WA) (the **WA Act**) provide more certainty with respect to this exclusion.

-
- (e) The definition contained in section 4(3) of the WA Act and judicial interpretation of this section excludes, in addition to mining activities, processing plants in their entirety from the scope of the Act. This section states:

4. Construction work

Despite subsection (2) construction work does not include any of the following work on a site in WA —

- (3) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
- (a) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;
- (b) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;
- (c) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals;
- (d) work prescribed by the regulations not to be construction work for the purposes of this Act.
- (f) Section 105(2) of the UK Act and judicial interpretation of this section excludes components of processing plants that are integral to the process from the ambit of the Act but includes construction works which do not form part of the processing. This section states:

105. Meaning of “construction operations”

- (2) The following operations are not construction operations within the meaning of this Part —
- (a) drilling for, or extraction of, oil or natural gas;
- (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
- (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is —
- (i) nuclear processing, power generation, or water or effluent treatment, or
- (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink; ...
- (g) Consideration should be given to whether the BCIP Act should ultimately exclude the construction of mineral processing plants in their entirety, or whether it is the processing element of the plant work that should be excluded. If the former is preferred, the definition in the UK Act could be adopted.
- (h) If the assumption is that claims over a certain value should be excluded from the BCIP Act, it is suggested that the value of a claim does not necessarily reflect its complexity. Therefore, limiting the application of the BCIP Act to claims of a stated value is not likely to assist in meeting the objects of the BCIP Act. However, the difficulty of complex claims would be obviated to some degree by extending the timeframes for applications and responses (we deal with this at 9 below).

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?

It is our view that:

- (a) Parties presently are, and should remain, free to contract in whatever name and capacity they desire. That should include the right not to disclose the capacity in which it contracts.
- (b) Parties should not have to make further inquiries outside the contract as to on whom to serve a payment claim. This will result in parties having to take unnecessary further steps and incur additional time and cost not presently contemplated by the BCIP Act. Instead, parties should be able to rely on the details of the other contracting party/ parties contained in the contract when considering upon whom to serve a payment claim under the BCIP Act.
- (c) The identification of the relevant party on the same basis as it is identified in the contract should be sufficient to ensure the payment claim is served on the correct entity.

Jurisdiction of adjudicators to decide payment claims

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?

It is our view that:

- (a) Given the object of the BCIP Act, it is appropriate that only contractors (not principals) be entitled to serve payment claims.
- (b) In practice, these are the parties that carry out construction work or supply related goods and services for payment, and accordingly it is appropriate that they

remain the only parties able to enliven the provisions of the BCIP Act.

- (c) The objects of the BCIP Act are clearly to promote cash flow within the industry. To allow principals to serve claims would be contrary to that policy and furthermore would shift the purposes of the BCIP Act from 'cash flow' focused to a more general form of alternative dispute resolution. Such an alternative dispute resolution model has been used with some success in the UK where any 'dispute' (not necessarily a payment claim) can be referred to adjudication. If this model was to be adopted, the BCIP Act would require wider amendments. If the BCIP Act is to remain in its current form, its purposes should not be confused.

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?

It is our view that:

- (a) The answer to this question is directly linked to the outcomes of questions 3, 8 and 9.
- (b) Assuming that:
 - (i) principals cannot lodge payment claims (see 3 above);
 - (ii) the method of appointing adjudicators is changed (see 8 below);
 - (iii) the timeframes for serving payment claims, payment schedules, adjudication applications and adjudication response are changed (see 9 below); and
 - (iv) the submission set out in paragraph 4(e) below is implemented,the BCIP Act should be amended to allow an adjudicator to direct payment in favour of the respondent for an amount greater than the claim.

-
- (c) It has been well documented that the BCIP Act aims to provide parties with a faster and cheaper alternative to resolving the disputes than entering the court system.
 - (d) In order to effectively determine the amount properly due to a claimant, respondents to a payment claim should be entitled to fully defend the claims brought against them by counterclaiming, claiming variations or set-off of monies owing to them during the relevant payment period to the extent the BCIP Act presently permits this. To allow respondents to fully defend any claim brought against them is clearly in the interests of justice.
 - (e) Further, the ability of adjudicators to allow payments in favour of respondents for larger amounts than those claimed is necessary to ensure fairness in the process and may reduce unfounded claims because claimants will be required to face a more comprehensive and more balanced approach to the application of the BCIP Act because of the risk of a finding that they have actually been overpaid (as may often be the case in practice given the industries practice of paying on account).
 - (f) This ability could be considered as a half-way measure to allowing principals to make claims (see section 3 above) in as far as it is consistent with the current intent of the BCIP Act for the claims to be made by persons seeking payment. However, it balances what is currently the somewhat one-sided nature of the BCIP Act by allowing the principals or head contractors to fully defend any claims brought as they would be entitled to in any other dispute resolution process..

Claims for breach of contract and other matters

- 5. Do you believe the type of payment claim under the BCIP Act should be restricted? If so, should payment claims under the BCIP Act be restricted to:
 - (i) contract price for the work;
 - (ii) any other rates or prices stated in the contract;
 - (iii) 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
 - (iv) the estimated cost of rectifying any defects in the work?

It is our view that:

- (a) This question is linked to questions 3 and 4.
- (b) The BCIP Act should remain as it is currently drafted, without restriction, providing that it continues to be the case that principals cannot serve payment claims (see 3 above).
- (c) Variations, extensions of time related costs and defects generally comprise major parts of the amount due; therefore, to exclude or restrict such claims would not be consistent with the cash flow policy of the BCIP Act and make the application of the BCIP Act more complex and arbitrary.

Types of decisions available to the adjudicator

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

It is our view that:

- (a) Given that the BCIP Act adopts an interim determination approach, it is not appropriate that it be expanded to

allow adjudicators to require the release of security. Doing so would give rise to the possibility that the party entitled to the benefit of the security will lose the contractual protection provided by the security should the dispute be finally determined in that party's favour.

- (b) This change would have implications far beyond the objectives of the BCIP Act and significantly and unfairly impact on a respondent's rights, especially in circumstances of insolvency.

Referencing the BCIP Act on payment claims

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

It is our view that:

- (a) Claimants must be required to reference the BCIP Act on payment claims if they intend to rely on it. Any requirement to the contrary effectively means that respondents are forced to deal with every contractual progress payment as if it were a payment claim under the BCIP Act.
- (b) The effect of such a contrary approach would be that:
- (i) costs for both principals and contractors (where subcontractors are engaged on a project) will increase;
 - (ii) statutory timeframes for dealing with claims will become unmanageable;
 - (iii) certainty surrounding the election to enliven the provisions of the Act would become blurred. This becomes particularly problematic in cases of subcontractors, where an election must be made between proceeding under the BCIP Act and the *Subcontractor's Charges Act*;

- (iv) there is the potential for an increase in disputes before the court where parties dispute whether a claim was purported to be made under the contract or under the BCIP Act; and

- (v) the industry would be burdened with a very significant wasted cost.

- (c) Such an approach appears contrary to the intention of the BCIP Act. It is not evident how this amendment will aid in the timely and cost-efficient resolution of claims.

Process for appointment of an adjudicator

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

It is our view that:

- (a) The current process for appointment of adjudicators is not appropriate. This is because:
- (i) there is a lack of regulation and quality checking of the decisions of the adjudicators;
 - (ii) the current process enables claimants to 'forum shop' or switch Authorised Nominating Authorities based on the approach taken by particular adjudicators in their previous decisions; and
 - (iii) there is a perceived conflict of interest or lack of independence in the process. It is in the interests of both claimants and respondents that Authorised Nominating Authorities and adjudicators be free of this type of real or perceived conflict and be completely independent.
- (b) A preferable approach would be to give greater power to the Adjudication Registrar to regulate the pricing and timing of decisions, hear complaints about adjudicators including fees charged or time taken and most importantly to nominate

Authorised Nominating Authorities to deal with individual adjudication applications in the event that the parties have not agreed to an Authorised Nominating Authority either in their contract, or at the time of the adjudication application.

- (c) To this end, if parties are permitted to nominate an Authorised Nominating Authority in their contract, there may need to be statutory protection against subcontractors not being free to fairly negotiate Authorised Nominating Authorities for the purposes of their contracts.
- (d) This proposed alternate approach would lead to:
 - (i) increased transparency and accountability of Authorised Nominating Authorities and adjudicators;
 - (ii) the removal of commercial influences and conflicts of interest in the process for selection of Authorised Nominating Authorities and adjudicators; and
 - (iii) potentially an increase in the quality of decisions including reasons that the parties receive. It is in the best interests of all parties involved that considered, well reasoned decisions are given in all cases.

Timeframes for making and responding to a payment claim

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?

It is our view that:

- (a) The timeframes for making and responding to claims under the BCIP Act are not appropriate because they require a respondent to respond comprehensively within 10 business days to a payment claim which the claimant has had the benefit of up to 12 months to prepare.
- (b) The very serious consequences for a respondent of not giving a payment schedule or service an incomplete payment schedule mean that the period for service of a payment schedule should be extended by an extra five business days.
- (c) Also, with an increase in the number of large and complex claims, also allowing an extra five business days for serving adjudication responses would result in the issues between the parties being more adequately addressed, which in turn would assist the adjudicators in deciding the claim.
- (d) The increase of five business days would help alleviate the time-pressure over the Christmas and Easter periods and avoid any need to change these.
- (e) The current period of 12 months after the construction work, goods or services was last carried out or supplied is unclear in practice and often disputed by the parties involved. In the interests of certainty, a date from which to start the 12-month period needs to be specified that is easily determinable with reference to the contract. It may be worth considering this being 12 months from the date of practical completion, or, where this is not provided for or is not ascertainable from the contract, a statutory definition of the relevant date should be provided.
- (f) Special provision should be made for payment (if any) arising from defects rectification work or variations to deal with defects if claimants are to be given the benefit of the BCIP Act in connection with these.

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

It is our view that:

- (a) The BCIP Act does allow claimants to serve large and complex payment claims in an unfair manner, because the process set out in the BCIP Act essentially gives a claimant the benefit of at least four weeks' preparation time before submitting a payment claim. A respondent then has only 10 business days to respond and that response needs to address all matters they intend to rely upon in the adjudication response.
- (b) Further, amendments could be made to the BCIP Act to require the presentation of the claim to follow the contractual requirements for calculating the amount due. For instance, if the contractual payment clause sets out the matters to be considered for calculating the amount due, then the claim should be presented in a way that logically addresses each of the heads of claim in order. At present, the BCIP Act has no requirements regarding the presentation of the claim and this results in large and (sometimes unnecessarily) complex payment claims being served in an unfair manner. The BCIP Act should be amended to address this. Such an amendment would:
 - (i) result in a faster and more efficient process for adjudication decisions, because an adjudicator will be more easily able to apply the contract to the claim; and
 - (ii) facilitate proper consideration being given by an adjudicator of the requirements of the contract (as is required by the BCIP Act), because they will have the benefit of understanding how a claimant's claim fits with a contract.

Securing amounts payable pending an adjudication decision

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

It is our view that:

- (a) The BCIP Act should not be amended to allow claimants to place a charge on monies owing to a respondent head contractor by a principal at the lodgment of an adjudication application.
- (b) Currently, the *Subcontractor's Charges Act* governs charges placed over money owed up the contractual chain. Given the consequences that can flow from placing such a charge over money owed to a contractor by a principal, this act requires a claimant to commence court proceedings in respect of their claim within a set timeframe. The *Subcontractor's Charges Act* is the appropriate forum for consideration of such issues.
- (c) Further, given the BCIP Act is based on interim determinations, which aims to enable money to move through the contractual chain, it does not seem appropriate that the BCIP Act should allow the lodgment of charges which, in practice, would result in large amounts of money being tied up. This hinders, rather than aids cash flow, contrary to the intention of the BCIP Act.
- (d) In the event that the BCIP Act was amended to enable a claimant to place a charge on monies owing to a respondent head contractor by a principal, the *Subcontractor's Charges Act* would need to be amended to ensure the two Acts work seamlessly together. For example, such amendments would need to deal with the situation whereby a charge is placed over money owing to a respondent head contractor

by a principal, the claimant is successful on its adjudication application but the respondent applies to the court to have the decision of the adjudicator overturned and is successful.

Retention

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

- (a) We do not see the need for legislative reform in this area. Parties are free to negotiate the manner in which retention monies are dealt with under their contracts and this situation should remain.

Current rights of review

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

It is our view that:

- (a) The right to seek judicial review of adjudicators' decisions in appropriate circumstances (including where an essential and basic requirement of the Act has not been complied with) is an essential safeguard that ensures claimants are not improperly awarded payment under the BCIP Act.
- (b) The benefit of being able to challenge an adjudicator's decision in court outweighs the risk of misuse of this process. The court process is relatively quick and requires a party pay the disputed amount into court before leave is granted. Adverse cost consequences flow for the unsuccessful party. Accordingly, there is already some protection against misuse contained in the BCIP Act and the current rights of review should therefore remain unchanged.

Other

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?

The issue of which party pays the adjudicator's fees requires further consideration.

- (a) Currently, the BCIP Act gives the adjudicator a discretion to decide the proportion of their fees each party is required to pay. This can result in one party being required to pay 100 per cent of the adjudicator's fees, which can be substantial.
- (b) In order to ensure the effectiveness of the adjudication process under the BCIP Act and greater fairness, it should be amended to reflect the fact that the apportionment of fees should be based on a parties' success on particular issues, including time and/or cost components, rather than simply apportioning the value of the claims decided in favour of a particular party.
- (c) This is also addressed by the submission made in response to question 8.

Section 3 – Application of the BCIP Act to contractual terms

15. Would you support the making void of any unreasonable timeframes for notification of extensions of time requests within contracts?

It is our view that:

- (a) Different sectors of the industry will have differing views on what constitutes an unreasonable timeframe. Similarly, what is unreasonable on one project may be reasonable on other.
- (b) Accordingly, it does not aid in the usefulness of the BCIP Act for it to take a 'one size fits all' approach to what is unreasonable.
- (c) Currently, the unreasonableness of any contractual timeframes is sufficiently addressed through relevant case law. The BCIP Act should not interfere with that case law which itself indicates the complexity of the issue of what is unreasonable.
- (d) In practice, the introduction of statutorily designated timeframes will result in a reduction in contractually agreed timeframes as parties to construction contracts will simply default to using the timeframes set out in the BCIP Act regardless of whether they prove unreasonable within the context of the project, construction work, goods or supply to which they will be applied.

16. Would you support the making void of any unreasonable timeframes for notification of variations within contracts? If a minimum timeframe was set by legislation how many business days do you believe are reasonable for a variation to be lodged?

Our view is that:

- (a) As set out at 15 above, introducing a statutory concept of unreasonableness is problematic.

- (b) Practically, unreasonable timeframes for the notification of variations under construction contracts is not industry standard practice. Accordingly, parties should remain free to contract based on project-specific needs.

- (c) The BCIP Act should not be amended to include a statutory definition of what constitutes an unreasonable amount of time. A 'one size fits all' approach is not appropriate given the industry to which the BCIP Act applies.

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?

It is our view that:

- (a) While termination for convenience clauses may be abused by a small minority in the industry, such clauses serve a very constructive purpose and therefore should not be rendered void through statute. They are particularly important and have very valid reasons for inclusion in government contracts, large scale contracts and long term contracts.
- (b) Practically, such clauses are used to allow large-scale projects to proceed in circumstances where the future risk profile of project might otherwise mean they would not. This purpose should not be overturned or regulated by statute. The industry as a whole benefits from the ability for projects to progress.
- (c) It should be left to the parties to negotiate the terms of payment in the event of termination for convenience and it is not appropriate to mandate claims for loss of profit in all circumstances. This would result in a contractor receiving a very significant and uncommercial windfall in many circumstances.

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

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

In our view:

- (a) Section 99 of the BCIP Act deals with contracting out. It has been the subject of much judicial interpretation.
- (b) As it currently stands, section 99 of the BCIP Act is sufficient to protect parties against unreasonable contractual provisions or contractual provisions which restrict the application of the Act.
- (c) Further, it would be impossible to generically state which preconditions are unreasonable and unfair without considering the context of the particular project, construction work, good or supply.
- (d) It is not in the best interests of parties to a construction contract to have an adjudicator decide what is a reasonable or unreasonable, and subsequently void, contractual provisions. Accordingly, any contractual preconditions are best addressed by the parties with reference to specific project requirements when entering into particular construction contracts.

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?

In our view:

- (a) Legislating to make clear that a statutory declaration attesting to the payment of workers is a valid precondition to the submission of a payment claim is problematic.
- (b) In the event the legislative change is made, it would need to be carefully drafted to ensure:
 - (i) consistency as to what payment is being declared. For example, the industry generally pays prospectively, which means that amounts being claimed may be for amounts yet to be paid to subcontractors;
 - (ii) consistency as to who is required to make the declaration so as to ensure it is made by a person with appropriate authority, who is in control of the company's payments; and
 - (iii) parties are clear on how to deal with disputed payments to subcontractors or those lower down the contractual chain. For example, will this result in contractors simply declaring they are in dispute with all subcontractors? This will effectively negate the intent of the amendment.

Allens › ‹ Linklaters

visit www.allens.com.au