Submission No.43

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16 June 2014
The Research Director
Transport, Housing and Local Government Committee
Parliament House
George Street
Brisbane 4000

By email :- thlgc@parliament.qld.gov.au

Dear Director,

Transport, Housing and Local Government Committee
Submission #2 on the Construction Industry Payment Amendments Bill 2014

Lowry Consulting is pleased to make this submission to Transport, Housing and Local Government Committee (THLGC) in response to its invitation with respect to Building and Construction Industry Payments Amendments Bill 2014.

The Amendmant Bill has addressed some of the issues that have inhibited the operation and uptake of the Act. We agree with the abolition of ANA's in favour of a single nominating authority. We have made a separate submission on that matter.

However, in my view, the amendments have focussed too heavily on the dispute resolution provisions of the Act rather than improving the payment process in the industry, the area where productivity improvements lie. I refer to the Preamble in my earlier submission to the discussion paper (attached).

The Act should address the difficult and contraversial issues of:

- Practical completion (Key recommendation No 5);
- Termination of contracts for convenience should be outlawed. It is being used to circumvent the Act on a lkarge proportion of adjudications (Recommendation No 10);
- Electronic service of documents (Recommendation No 6);
- Empower adjudicators to rule on the release og bank guarantees in liew of retentions. (Key recommendation No 9);

The Act would encourage more proactive engagement if it:

- Abandoned elective payment claims.(Key recommendation No 2);

Thank you for the opportunity to make this further submission in relation to the Act.

Yours Sincerely,

John Lowry
Managing Director
Lowry Consulting

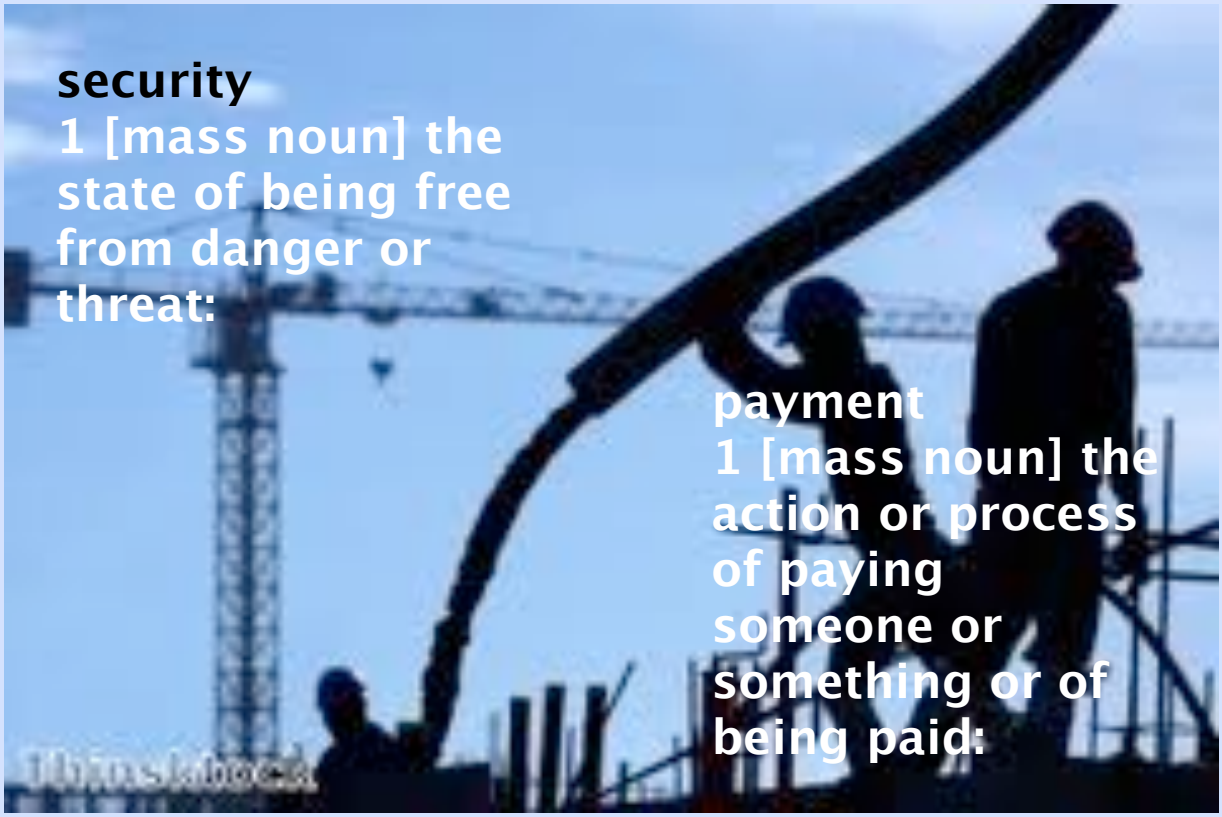
Attachment - Response to discussion paper Dec 2012

Payment dispute resolution in the Queensland building and construction industry

Response to Discussion Paper dated December 2012

AQSAS - Australian Quantity Surveyors Advisory Services

22 February 2013



Payment dispute resolution in the Queensland building and construction industry

Response to Discussion Paper dated December 2012

AQSAS - Australian Quantity Surveyors Advisory Services

PREAMBLE

The title of this discussion paper is misleading and reinforces the commonly held view that the Act's primary function is to establish an alternative rapid dispute resolution mechanism (adjudication) of payment disputes in the building and construction industry.

Disputes are the antithesis of **SECURITY** and orderly **PAYMENT**.

Disputes add no value to businesses or industry sectors that do not directly benefit from dispute resolution. They are, by their nature, **unproductive**.

As soon as a dispute arises the parties are working on the past. It closely resembles the definition of depression, "worrying about past events".

Disputes lead to distrust, waste capital and focus the minds of people and businesses on how to get paid, rather than how to do a better job. **Clients become collateral damage in this situation, as the parties cease to work as a team for a common goal.**

The construction industry, driven by the dispute resolution industry that has built up around it, has lost sight of the fact that the Building and Construction Industry Payments Act 2004 (BCIPA; The Act) has two primary functions. These are:

1) **To establish a clear, concise, transparent framework and procedure within which payments can be readily evaluated and payment made within reasonable commercial payment terms;**

2) **To establish a system for rapid adjudication of payment disputes, should they occur.**

The most important consideration for the Government, in reviewing the operation of the Act, is to create an environment that reduces the number, cost and wasted time of payment disputes and directs the industry towards a future that is:

- Productive;
- Sustainable;
- Innovative, and
- Cooperative

and focusses all of its energy on working in a team towards client outcomes.

Government must be careful, in doing so, not to accede to the business interests of any one sector of construction or its support sectors above the interests of society or the industry at large; the 99%.

If it does so, it runs the risk of failing in its duty to serve the public.

Hilary Clinton, in her recent interview, said, *"I support open competition, provided that there are rules. Everything, be it sport, business or politics requires rules that everyone abides by"*.

The construction industry has demonstrated, over the past 40 years, that it can not regulate itself with respect to payment and contract management through the application of reasonable business ethics. From top to bottom, including major Government contracts, there are no ethical business rules. As a result the industry is dysfunctional and inclined to self-immolation. The key economic and social outcomes stated above will not be achieved without intervention.

This Government can, and should, take the lead by helping to create a business environment in which the industry can thrive.

Dr Martin Barnes, CBE, project management pioneer, engineer, inventor of the famous Barnes Time-Cost-Quality Triangle and author of the British NEC contracts and civil engineering standard method of measurement (Editions 1 - 3) says, in relation to the NEC Contracts,

"Traditional contracts in the construction area were all designed and drafted with no idea of stimulating good management – it was a revolutionary idea that they might. Essentially, I designed NEC as a way of managing all the interfaces on a project so that people were motivated towards foresighted co-operation instead of retrospective arguments about money."

He reinforced this view in his forward to the CESMM3 (Civil Engineering Standard method of measurement ED 3), when he said, *"The less contractual pressures cause distortion of the form of the prices exchanged from actual costs….the better…….....Confidence in being paid fully, promptly and fairly will lead to the prosperity of efficient contractors and the demise of those whose success depends more on the vigour with which they pursue doubtful claims".*

The essential idea is that, if payment procedures in a contract (or in this case legislation) do not attempt to follow the actual process as much as possible, contractors start to focus on the process for getting paid, instead of the work they are meant to be doing. It is most relevant in engineering contracts where payment and contract management procedures often have very little correlation with reality, but it is equally relevant here.

The principle to be observed with respect to the BCIPA is not to allow contractual or political pressures to interfere with sound process.

In the case of the BCIPA, the legislation currently mirrors the traditional construction payment process, with minor exceptions, whilst setting it in a commercial time frame and preventing certain unconscionable conduct.

It fulfills this function admirably well. It is not part of the traditional procedure that purchasers serve a "reverse invoice or payment claim" with the expectation of being paid back. The valuation of payment should be thorough and prudent, including recovery through liquidated damages and contractual dispute resolution processes.

It would be a tragedy if the BCIPA allowed the politics of the parties and the dispute resolution industry to manipulate the Act for their own purposes, moving it away from

sound, traditional procedures and, in the process, creating an ineffective burden on the industry with little benefit to the parties, the industry or society. The Victorian security of payment act is good examples of legislation that do not reflect the real-world process and do nothing to advance the overarching objectives of Government or the interests of the construction industry. As a result, it is largely ignored by the industry; and that is as well.

Similar changes to the BCIPA would almost certainly have the same effect.

This response focuses, not on dispute resolution, but on the issues that have arisen around a reluctance to adopt the Act and the many actions taken to avoid or frustrate the operation of the Act.

The BCIPA is essentially excellent legislation designed, first and foremost to foster industry best practice and to direct change management in the construction industry culture towards sustainable business practices.

The Government and the industry must ensure that the BCIPA continues to fulfill these objectives.

RECOMMENDATIONS

The following recommendations are based on three principles:

•That Government can and should create a business and contractual environment to foster key political, economic and social objectives of Productivity, Sustainability, Innovation and Cooperation by establishing a mandatory payment procedure for construction contracts, set within a time-frame of reasonable business terms of payment.

•The legislated default process should, as near as possible reflect real-world procedure.

•Everything should be focussed on client outcomes.

KEY RECOMMENDATIONS, IN ORDER OF PRIORITY

1) Replace the 12 month time limit for payment claims with appropriate separate time limits for progress claims, substantial completion claims and final claims. (Q. 9)

> **This change alone will dispel the negativity surrounding so-called "ambush claims", release and waiver documents, issues with the timing of payment in Government Managing Contractor contracts and other issues associated with the timing of payment claims.**

2) Abandon elective payment claims in favour of compulsory adoption of the legislated payment process. This will avoid the intimidation that is rife in the industry, do away with the many and varied contractual avoidance tactics and will ensure that reluctant government departments adopt the legislated process. It will also avoid so-called 'ambush claims' and similar abuses of the existing system. (Q.7)

3) Replace private enterprise ANA's with neutral non-profit ANA's or a single ANA under the BCIPA. (Q. 8).

4) Link the Subcontractors Charges Act to the BCIPA to help protect claimants against their client's insolvency while they are working through the BCIPA process. Alternatively, introduce an amendment to the Act requiring a principal to withhold monies, similar to the NSW Act amendments. (Q 11).

5) Retentions (Q.12):

> **item 1: Introduce a default provision providing for a definition and trigger, upon the supplier's application, for the granting of a date of substantial completion.**
>
> **Item 2: Limit the time that retentions may be held for each subcontract.**
>
> **Item 3: Implement a secure repository to hold and distribute cash retention funds.**

Item 4: Void any provision that prevents a supplier from offering a bank guarantee or similar surety as an alternative to cash retention.

SECONDARY RECOMMENDATIONS

6) Provide for electronic transmission of documents under the *Electronic Transactions Act (Qld) 2001. (Q.2)*

7) Establish reasonable time-frames for the giving of notices for extensions of time and variations. (Q15,16).

8) Establish allowable pre-conditions to payment. There should be no pre-conditions to the service of a payment claim. (Q17). This will avoid current and emerging avoidance tactics, including special "delivery" requirements, pre-estimates and the emerging trend of payment claims pre-formatted by purchasers.

An adjunct to this recommendation is the inclusion, by regulation, of acceptable payment claim formats. This will ensure that payment claims are properly formulated and will do away with the lazy practice of using Tax Invoices as Payment Claims.

9) Empower adjudicators to release performance securities including retentions and guarantees. (Q.6).

10) Empower adjudicators to decide if a contract has been terminated to avoid the respondent's obligations under the Act (Q.17)

EXECUTIVE SUMMARY OF RESPONSES

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?

Response: No we do not believe that the jurisdiction of the Act should be narrowed to exclude certain types of work, or for work over (or under) any stated value.

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?

Response: No. If Respondents were to adopt the Act as best practice payment process, as intended by the Act itself, this issue would resolve itself.

Respondents should be discouraged from making special "pony express" arrangements for the service of payment claims. The Act should provide for electronic transmission of documents under the *Electronic Transactions Act (Qld) 2001.* This will also pave the way for productivity gains and innovation with the adoption of collaborative communication systems.

Purchasers should not be rewarded by the Act for taking a recalcitrant attitude towards adopting the Act.

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?

Response: No. This would have the effect of,

a) potentially doubling the number and complexity of disputes, and

b) returning the power of cheque book negotiation to purchasers.

Given that the operation of the Act, for the purpose of a sound payment process, could be improved significantly with little more than a change in attitude, a wholesale change to include two-way claims would add a layer of complexity and contractual and legal jousting that is more likely to create more disputes than reduce them.

Such a change would also re-set the power imbalance towards purchasers with large fighting funds.

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?

Response: No. It is not part of the traditional procedure that purchasers serve a "reverse invoice or payment claim" with the expectation of being paid. A purchaser already has the ability to withhold amounts for legitimate defects and contractual entitlements. That balance should remain.

It would be a tragedy if the BCIPA allowed the politics of the parties and the dispute resolution industry to manipulate the Act for their own business advantage, moving it away from sound, traditional process and, in the process, creating an ineffective burden on the industry with little benefit to the parties, the industry or society.

In our experience Respondents often attempt to use counter-claims to intimidate Claimants into negotiating discounts. In many cases that we have seen, these claims are either new or manufactured. An analysis of decisions would support this contention.

Given that the operation of the Act, for the purpose of a sound payment process, could be improved significantly with little more that a change in attitude, a wholesale change to include two-way claims would add a layer of complexity and contractual and legal jousting that is more likely to create more disputes than reduce them.

Such a change would also re-set the power imbalance towards purchasers with large fighting funds.

Question 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:

- **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 defects in the work?**

Response: The Victorian Security of Payment Act has not resulted in better payment processes in the construction industry. It favours existing power imbalances and leads to a cumbersome, unnecessary two-path system for construction payment.

There is absolutely no reason, with good management, that variations, latent conditions and time-related costs can not be managed and valued on a month to month basis. Restricting the Act, as proposed, rewards bad management and inhibits productivity and innovation.

The definition of variation could be clarified to say, “any variation to the contract by which the contract price is to be adjusted”.

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

Response: Yes; Guarantees and undertakings are a common substitute for retention. If an adjudicator is empowered to decide on the release of a cash security as part of a payment claim, she/he should be empowered to order the release of a guarantee or undertaking that underwrites the same security.

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?

Response: No. The procedure defined by the Act should be compulsory for all construction contracts.

Question 8: Do you consider the current process of authorised nominating authorities appointing adjudicators appropriate?

If not, what alternate system would you propose?

Response: No. The current system of profit motivated ANA's appointing adjudicators detracts from the operation of the Act. It leads to claims, real or imagined, of bias, places undue pressure on adjudicators and does nothing to facilitate the proper operation of the Act.

Either ANA's should be impartial non-profit organisations or The BCIP Agency should be the sole Agency for the certification of adjudicators, nomination of adjudicators for adjudications, collection, analysis and interpretation of data and the promotion and facilitation of the proper operation of the Act.

We recommend replacing private enterprise ANA's with a single ANA under the BCIPA or restricting ANA's to non-profit industry organisations, similar to the Western Australian legislation.

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?

Response: With the exception of the 12 month period for a progress payment the time frames for the payment and adjudication processes under the Act are achievable, reasonable and serve the purpose of the Act to provide reasonable commercial terms of payment for regular progress payments.

The time for serving a payment claim should be:

- In the case of Progress Claims - 5 business days from the Reference Date;
- In the case of Substantial (Practical) Completion Claims - 3 months from the Date of Practical Completion;
- In the Case of Final Claims - 30 business days from the date of Final Completion.

The exclusion of additional days between Christmas and New Year is reasonable. Easter, by definition falls between Friday and Monday. There is no reason to extend the excluded days beyond the promulgated public holidays.

Special or bank holidays should be specifically excluded or included as business days under the Act.

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?

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

Response: No. As noted above, in Q 9, Claimants and Respondents allow claims to build up over time, either as a deliberate tactic by one or other party for a perceived benefit, or through lazy or incompetent contract management.

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?

Response: Yes. The SC Charges Act should be linked to the BCIPA to help protect claimants against their client's insolvency while they are working through the BCIPA process.

Alternatively, an amendment to the Act requiring a principal to withhold monies, similar to the NSW Act amendments should be introduced.

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

Response:

Item 1: Substantial (Practical) Completion and Release and Waiver Documents

Every contract should have a procedure for identifying and certifying substantial completion. The Act should have a default provision for establishing substantial (practical) completion.

Item 2: The Act should limit the time that retentions may be held for each subcontract.

There is no reasonable argument why the period that retentions are held should be more than is necessary to secure a subcontractors performance of a contract to the extent it is known at the time of practical completion.

Item 3: Independently held retention funds.

We understand from the industry that the loss of retention monies to insolvent clients is very damaging to otherwise viable businesses. We would not object to the adoption of trust accounts for the purpose of protecting monies held as retentions to secure specific performance.

Item 4: Alternative Securities - The Act should void any provision that prevents a supplier from offering a bank guarantee or similar surety as an alternative to cash retention.

We understand that some purchasers insist on cash retentions. The Act should void any clause that inhibits a supplier from providing security by way of a bank guarantee or similar surety.

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?

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

Response: In our experience, as a nominating authority and as an adviser to claimants and respondents, it is our opinion that the Act strikes a reasonable balance between ensuring cash-flow and protecting parties entitlement to seek redress through the legal process.

Recent changes to the BSA financial regulations in relation to notification of a judgement debt add sufficient incentive not to withhold payment for tactical reasons.

It would not be wise to overstep other legal avenues and entitlements.

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?

No

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

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

Response: Yes, we support the restriction of unconscionable time frames for notices and other matters that can be used for tactical contractual purposes.

We also recognise the need to encourage productivity and innovation in contract management.

We recommend the Act introduce a minimum notice period for extensions of time of 10 business days. This period would strike a balance between punitive timeframes, the need to maintain reasonable progress on site and the desire to encourage productivity and innovation in the industry.

Question 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?

Response: Yes, we support the restriction of unconscionable time frames for notices and other matters that can be used for tactical contractual purposes.

We also recognise the need to encourage productivity and innovation in contract management.

We recommend the Act introduce a minimum notice period for variations of 10 business days. This period would strike a balance between punitive timeframes, the need to

maintain reasonable progress and the desire to encourage productivity and innovation in the industry.

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?

Response: We support making a void provision in a construction contract where a purchaser terminates a contract with the intention or for the purpose of avoiding its payment obligations under the Act.

In those circumstances we agree that a claimant should be able to recover losses under the Act.

Adjudicators could be given jurisdiction to decide this matter.

Question 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:

•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?

Response: We agree that the Act should specifically address preconditions to payment.

Unfair and unreasonable pre-conditions include:

Special ‘delivery’ requirements for payment claims;

The requirement for excessive detail and repeated information, such as currency of insurances.

Enforcing Purchasers “in-house” payment systems, including pre-prepared Payment Claims and Payment Claim formats;

The role of Superintendent’s (and Architect’s) Certificates may be clarified. It is the responsibility of professional associations to address contract procedures that comply with and facilitate the operation of the Act.

All preconditions, including statutory declarations, should be preconditions to payment and not to an entitlement to serve a Payment Claim.

The BCIPA should mandate the content and form of Payment Claims, through regulation. *(See attachment).*

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?

Response: We agree that it is reasonable to seek statutory declarations that the claimant has paid its labour and suppliers, as a precondition to payment, but not as a precondition to the service of a payment claim.

RESPONSES

The BCIP Act

Introduction and General Remarks

The title of this discussion paper is misleading and reinforces the commonly held view that the Act's primary function is to establish an alternative rapid dispute resolution mechanism (adjudication) of payment disputes in the building and construction industry.

Whilst this view might be convenient for some stakeholders, it is not helpful to the construction industry at large. It has caused fear amongst respondents, large and small, and this in turn has led to unintended, bad outcomes.

These outcomes include, but are not limited to:

- the development of complex contractual payment arrangements that are, at the least, not in the spirit of the Act;
- a reversion to less productive technologies;
- the development of terms of contract that are damaging to claimants and are difficult, if not impossible to comply with using current technologies or significant increases in unproductive resources;
- open intimidation of claimants to avoid adopting the legislated procedures.

This negative view of the Act, and the subsequent actions of all parties has moved the industry away from every desirable objective, namely that the building and construction industry must work towards industry best practice that is:

- **Productive;**
- **Sustainable;**
- **Innovative, and**
- **Cooperative.**

Hilary Clinton, in her recent interview, said, *"I support open competition, provided that there are rules. Everything, be it sport, business or politics requires rules that everyone abides by"*.

The construction industry has demonstrated, over the past 40 years, that it can not regulate itself with respect to payment and contract management through the application of reasonable business ethics. From top to bottom, including major Government contracts, ethical business rules are not adhered to. Influential government departments are compromised between their allegiance to client departments and their public responsibility. As a result significant aspects of the industry are dysfunctional and inclined to self-immolation.

The key economic and social objectives stated above will never be achieved without intervention.

This Government can, and should, take the lead by helping to create a business environment in which the industry can thrive.

Dr Martin Barnes, CBE, project manager, engineer, inventor of the famous Barnes Time-Cost-Quality Triangle and author of the British NEC contracts and civil engineering standard method of measurement (Editions 1 - 3) says, in relation to the NEC Contracts,

"Traditional contracts in the construction area were all designed and drafted with no idea of stimulating good management – it was a revolutionary idea that they might. Essentially, I designed NEC as a way of managing all the interfaces on a project so that people were motivated towards foresighted co-operation instead of retrospective arguments about money."

He reinforced this view in his forward to the CESMM3 (Civil Engineering Standard method of measurement ED 3), when he said, *"The less contractual pressures cause distortion of the form of the prices exchanged from actual costs….the better…….Confidence in being paid fully, promptly and fairly will lead to the prosperity of efficient contractors and the demise of those whose success depends more on the vigour with which they pursue doubtful claims".*

The essential idea is that, if payment procedures in a contract (or in this case legislation) do not attempt to follow the actual process as much as possible, contractors start to focus on the process for getting paid, instead of the work they are meant to be doing. It is most relevant in engineering contracts where payment procedures often have very little correlation with reality, but it is equally relevant here.

The principle to be observed with respect to the BCIPA is not to allow contractual or political pressures to interfere with sound business process.

In the case of the BCIPA, the legislation currently mirrors traditional construction payment process, with minor exceptions, whilst setting it in a commercial time frame and preventing certain unconscionable conduct.

It fulfills this function admirably well. It is not part of the traditional procedure that purchasers serve a "reverse invoice or payment claim" with the expectation of being paid. The valuation of payment should be thorough and prudent, including recovery through liquidated damages and contractual dispute resolution processes.

It would be a tragedy if the BCIPA allowed the politics of the parties and the dispute resolution industry to manipulate the Act for their own purposes, moving it away from sound, traditional process and, in the process, creating an ineffective burden on the industry with little benefit to the parties, the industry or society. The Victorian security of payment act is a good example of an act that does nothing to advance the overarching objectives of the Government or the interests of the construction industry. As a result, it is ignored, by and large, by the industry; and that is as well.

The purpose of the Act

The **original and primary purpose of the Act**, as stated in s.8, *How object is to be achieved*, is:

(a) **granting an entitlement to progress payments** whether or not the relevant contract makes provision for progress payment. (it is inferred, and the Act embodies, that reasonable commercial payment terms should apply).

(b) **establishing a procedure** that involves**-**

(i) the making of a payment claim by the person claiming payment; and

(ii) the provision of a payment schedule by the person by whom the payment is payable;

In order to give the process effect, the Act follows with a method for the rapid adjudication of payment disputes, so that vital cash-flow can be maintained, even whilst associated contractual disputes are resolved through the contract or the courts.

The Act has legislated an admirable template for excellent payment process that codifies traditional payment processes in the industry and sets them within reasonable commercial payment terms.

When respondents and claimants wholeheartedly embrace the legislated procedures, immediate improvements are found in:

Productivity - **Disputes** add no value to businesses or industry sectors that do not directly benefit from dispute resolution. They are, by their nature, **unproductive**.

As soon as a dispute arises the parties are working on the past. It closely resembles the definition of depression, "worrying about past events".

All parties should be encouraged to adopt efficient, effective payment systems and procedures, rather than concentrate their efforts on ways to frustrate and avoid good business practice. Significant savings are achieved when contract managers are presented with consistent, properly formatted payment claims that can be responded to quickly and easily. Claimants are more likely to be paid on time if their payment claims are clear, concise and in a consistent complying format. Accounting double-handling is avoided when tax invoices do not have to be re-issued and / or BAS returns adjusted. Contractors are more likely to focus their energies on the job, rather than on getting paid. The time-frames and the legislated process encourage best practice contract management, because it is damaging to allow contract issues to drag on because of lack of systems and resources.

Sustainability - The construction industry, to survive and prosper, must attract good quality graduates and employees, of both genders, at all levels. Profitability and cash-flow allows businesses to confidently employ staff. People choosing a construction career path want to see a stable sustainable industry that offers a satisfying work environment. Whilst ever the industry continues to follow an aggressive dog-eat-dog philosophy, it will never attract the types of people who will drive innovation and a sustainable future.

In our recent experience, qualified tradespeople and management personnel are leaving the industry in significant numbers because they can no longer deal with the super-aggressive culture that it fosters. This view is confirmed by psychologists with significant numbers of clients from the industry.

Innovation & training - Capital is essential if innovation is to take root. Businesses will only spend on innovation and training, when it is confident that its cash-flow is secure. **Whilst the industry is innovative with technical and design processes it is not innovative with management systems. In fact, it positively discourages better**

management practice and exploits poor management practice. There are massive productivity gains to be made by adopting new management systems required to respond to the accelerated time frames in contracts and under the legislation.

Co-operation - Government and research facilities such as the CRC for Construction innovation all conclude that co-operation and transparency through the entire construction supply network is essential to successful, profitable, productive projects. At present cooperation only occurs at the highest level between clients and head contractors in management and alliance contracts. The Act, through its legislated procedures, promotes clear, transparent communications between parties to contracts that leads to open competition and reduced disputes.

Use of the BCIP Act

Page 11 of the discussion paper notes that anecdotal evidence suggests *"it would appear that the introduction of the BCIP Act has significantly improved the payment culture of the industry".*

In our experience, both as a nominating authority and as an advisory service, the quality of contractual provisions, payment claims, payment schedules and adjudication applications and responses has declined over the past six years.

The reason is that clients and head contractors, with their advisers, are concentrating their effort on frustrating, if not avoiding, the intent of the Act. They do this by:

a) creating contractual hurdles that are difficult or impossible to meet with existing technologies or without significant resources that they are not willing to pay for;

b) by creating complex, unworkable payment processes. A number of major contract sinclude provisions that all documents must be transmitted electronically, except for Payment Claims, that must be delivered in hard copy. *(Attachment - payment process)*

On the other hand, subcontractors are not responding with better systems, procedures, contract management and staff training.

We fail to see how watering down the Act can encourage better behaviour either on the part of purchasers or suppliers.

Subcontractors Charges Act 1974

The current restrictions in the Act require claimants to make a judgement as to whether their client is close to insolvency, usually without any knowledge other than rumour.

The SC Charges Act should be linked to the BCIPA to help protect claimants against a client's insolvency while they are working through the BCIPA process.

We have experienced a number of cases where the claimant has received a favourable award only to find the respondent has sought protection under administration. The outcome is the claimant has not only lost its payment but it is entirely responsible for the adjudication fees; a double whammy.

2.1 Jurisdictional issues

Application of the BCIP Act to construction work

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?

With respect to excluding the construction of mining infrastructure or other types of work

Response: **No we do not believe that the jurisdiction of the Act should be narrowed to exclude certain types of work, or for work over (or under) any stated value.**

Reasons

In our experience, mining infrastructure work is performed by the same head and sub-contractors as other building and civil construction work. There is no reasonable reason to exclude this work from the Act.

In fact, if anything, the mining infrastructure sector requires as much or more discipline as other parts of the construction industry. In December 2012 we wrote in Payment (really) Matters, *"Everyone wants a piece of the mining boom. It strikes me it's like the gold rush. Remote; attracts every cowboy and gold-digger - The atmosphere is a bit Wild West, with few rules and every man for himself. We see an increasing number of payment disputes because of poor or no contracts and poor contract administration. Many interstate mining / civil engineering companies have little experience working under the Queensland payment regime"*.

The context of the news item was in praise of recent decisions of the Supreme Court, clarifying the meaning of construction work in the mining sector. It makes a lot of sense to defer to the wisdom of the Courts on this matter.

A further case for the operation of the Act in this area is that many mining companies are large corporations with deep pockets, who can keep contractors at arms length with legal delaying tactics. Recently we were commissioned by a major contractor to interpret clauses in a mining company construction contract. I commented at the time, in my expert report, that the contract was easily one of the worst examples of a contract that I had seen in over thirty years in practice.

There is a need for the mining industry to develop significantly better contracts and better contract management. Inclusion in the BCIPA is one way to encourage better contract management practice.

Excluding mining, or other types of work, can only have the effect of halting progress towards more professional, productive, sustainable contract management practices.

This submission does not address the inclusion of resident home owners in the Act.

With respect to excluding work over a stated value

A major part of the function of the Act is to encourage better contract management processes.

In April 2010, HIA noted that 99% of participants in the construction industry are sole traders or small businesses. The power imbalance between purchasers and suppliers has not changed and is, if anything more evident in large construction projects.

Security of payment is more important in major contracts because of the sums involved and the significant commercial power imbalances experienced between purchasers and many contractors and suppliers of goods and services.

It is reasonable to expect that major contractors and subcontractors ought to be more professional than small contractors. Sadly, the opposite is the case. Major contractors, even public companies, actively discourage good process, innovation and productivity.

For example, some popular subcontracts require paper payment processes, but insist on all other communications electronically.

We know that major contractors discourage innovation and productive processes by intimidation and through their contracts.

We know that the majority of recent serious financial and personal problems resulted from major Government contracts.

Even with the protection of the Act, many subcontractors and suppliers have suffered financially and personally to the point of insolvency and crisis as a result of extraordinarily unbalanced sub-contracts.

In a recent (Jan 2013) interview with an industrial psychologist, the psychologist noted that the significant majority of his 2012 clientele of over 1000 people was drawn from a single major Gold Coast Queensland Government construction project, from construction supervisors down.

Giving main contractors more flexibility can do nothing but aggravate this situation.

30 day payment, upon which the Act is roughly based, is a perfectly reasonable and usual business term. There is nothing to stop respondents from managing variations and extensions of time during the course of the contract, within the legislated time frames.

The problem is, they do not do it because good management requires better resourcing with systems and people. Clients, contractors and their advisers have learned how to sell-down unmanageable risks to suppliers, who, by and large, accept the responsibility, but have little idea of the consequences and have insufficient systems and resources to manage their client's projects, even if they could, because they are inevitably selected on the lowest price basis. A comparison of any current major state government contract / subcontract will demonstrate exactly how this is achieved.

The inevitable result is conflict. It results in a negative effect on everything that governments profess to hold dear, namely productivity, sustainability, innovation and co-operative contracting.

Whilst clients and purchasers can and should comply with payment legislation, it is equally important that suppliers respond to the legislation and modern contracts with better systems and resources.

The Act, as it stands, strikes a reasonable balance between the interests of the parties, it encourages better contract management on all sides and discourages poor contract management.

A further related issue that exacerbates this problem is that Government departments routinely ignore state and national Governments' Codes of Practice by turning a blind eye to unconscionable subcontract terms that do not reflect head contract conditions. As noted above, the departments are conflicted between their responsibility to the public good as public servants and their commercial interest to satisfy client departments. They inevitably fall on the side of short-term gain - meeting the demands of client departments.

Governments should ensure that the public interest always takes precedence over the commercial conflicts of departments.

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?

Response: No. If Respondents were to adopt the Act as best practice payment process, as intended by the Act itself, this issue would resolve itself.

Purchasers should not be rewarded by the Act for taking a recalcitrant attitude towards adopting the Act.

Respondents should be discouraged from making special "pony express" arrangements for the service of payment claims. The Act should provide for electronic transmission of documents under the *Electronic Transactions Act (Qld) 2001.*

Reasons

This question is in response to claims of so-called "ambush claims" where a claimant makes a payment claim on a recipient that is not the regular recipient of a payment claim, thereby attempting to gain an advantage in a subsequent adjudication.

This issue has only arisen because respondents have discouraged the use of the procedures established by the Act as the preferred business-as-usual process. As a result, the industry expects that payment claims will only be served as the curtain-raiser to an adjudication application.

One of the clumsy responses that major contractors have adopted is the exclusive "pony express" delivery of payment claims, whereas all other contract communications may be via an electronic PIM (project information) system. It is anti-productive and anti-innovation.

We know that most contract communications are via email and, to a lesser extent, via PIM systems. Electronic systems, other than email, are designed to improve productivity and improve clarity, openness and certainty in contract communications and contract management.

There is an opportunity to foster productivity, innovation and open, clear contract communications, by enabling use of electronic transmission of documents under the *Electronic Transactions Act (Qld) 2001,* as well as the *Acts Interpretations Act.*

We have direct knowledge of subcontractors being threatened with future work if they attempt to institute clear, concise, transparent payment procedures that comply with the Act.

We have knowledge of a contract manager who was fired from a major government funded project because he implemented systems that did not "advantage" his employer.

Where purchasers insist on complying payment procedures as the business-as-usual process, nominating the recipient in the contract, there is little or no risk of an unexpected payment claim resulting in unfair advantage to the Claimant.

There are existing software systems that have been developed to specifically address the issue of complying payment claims. Adoption of these systems results in improved communications and transparency and improved productivity for all parties.

We have direct knowledge of subcontractors being threatened with future work if they attempt to implement modern software systems that comply with the Act, to manage their payment processes.

Once again, these problems arise, not because of the Act, but because of the parties reluctance or refusal to implement it correctly. Purchasers should not be rewarded by the Act for taking a recalcitrant attitude towards the Act.

Jurisdiction of adjudicators to decide payment claims

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?

Response: No. This would have the effect of,

a) potentially doubling the number and complexity of disputes, and

b) returning the power of cheque book negotiation to purchasers.

Given that the operation of the Act, for the purpose of a sound payment process, could be improved significantly with little more that a change in attitude, a wholesale change to include two-way claims would add a layer of complexity and contractual and legal jousting that is more likely to create more disputes than reduce them.

Reasons

This proposal goes well beyond the concept of maintaining cash-flow in the industry by deciding the value of a progress claim to a Claimant.

It is not part of the traditional payment procedure that purchasers serve a "reverse invoice or payment claim" with the expectation of being paid. The valuation of payment should

be thorough and prudent, including recovery through liquidated damages and contractual dispute resolution processes.

It would be a tragedy if the BCIPA allowed the politics of the parties and the dispute resolution industry to manipulate the Act for their own purposes, moving it away from sound, traditional process and, in the process, creating an ineffective burden on the industry with little benefit to the parties, the industry or society.

The Act does allow for offsets under a contract, in particular, the value of defects to be withheld from a payment claim, as is proper. It is the responsibility of purchasers to manage their contracts diligently and efficiently to ensure that they do not, and are not at risk of overpaying suppliers.

Purchasers often submit payment schedules demanding recovery from a supplier for defects and other contractual matters, including damages for delay. This is often done, in my experience as an intimidatory negotiating tactic. These counter-claims are typically newly manufactured for the purpose of a response or are long-running issues that the parties failed to address in good time.

We do not believe that respondents should be rewarded for poor contract management when a matter gets to adjudication.

Any attempt to bring counter-claims into the Act will cause significant increases in time and expense to the adjudication process, thereby, to an extent defeating its purpose to quickly and efficiently decide an amount to be paid.

In our view, counter claims should be left where they are, to be decided under the relevant dispute resolution clauses of contracts, or at law.

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?

Response: No. The reasons are similar to the reasons given in Question 3.

Reasons

No. In our experience Respondents often attempt to use counter-claims to intimidate Claimants into negotiating discounts. In most cases that we have seen, these claims are either new or manufactured.

Given that the operation of the Act, for the purpose of a sound payment process, could be improved significantly with little more than a change in attitude, a wholesale change to include two-way claims would add a layer of complexity and contractual and legal jousting that is more likely to create more disputes than reduce them.

Such a change would also re-set the power imbalance towards purchasers with large fighting funds.

Equally, an adjudicator should not be entitled to decide more than a claimant has claimed in a payment claim.

Claims for breach of contract and other matters.

Question 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:

- **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 defects in the work?**

Response: The Victorian Security of Payment Act has not resulted in better payment processes in the construction industry. It favours existing power imbalances and leads to a cumbersome, unnecessary two-path system for construction payment.

There is absolutely no reason, with good management, that variations, latent conditions and time-related costs can not be managed and valued on a month to month basis. Restricting the Act, as suggested in this question, rewards bad management and inhibits productivity and innovation.

The definition of variation be clarified to say, "any variation to the contract by which the contract price is to be adjusted".

Reasons

With reference to the *Building and Construction Industry Security of Payment Act 2002* (Vic), our experience (having considered making application as an ANA and lectured in Victoria on the Victorian Act) is that the Victorian Act is so restrictive it is not regarded as helpful and is, by and large, ignored by the industry in Victoria.

It is obvious that the Victorian Act was developed for dispute resolution purposes. it serves no other higher purpose, creating a framework for payment and a positive guidepost for the industry.

The Victorian Act, clarified by judicial review, has created a two-path system of claiming for payment. It is clumsy and unnecessary. It has also resulted in unintended outcomes, where a respondent was constrained from enforcing liquidated damages under a contract because the claimant refused to agree to the issues in dispute.

There is absolutely no reason, with good management, that variations, latent conditions and time-related costs can not be managed and valued on a month to month basis. It becomes a problem when parties do not apply sufficient resources and decent management to the task, or choose to drag out, or not submit, claims for tactical advantage. In our view the Act should positively encourage good management, innovation and better productivity, it should not reward poor management and the unconscionable conduct of delaying claims or responses for tactical advantage.

The Act, combined with the clarification and insight of judgements, both in Queensland and other States sine 1999, has settled on a perfectly reasonable balance of work that can be claimed in a payment claim.

Further, **it is fundamental to the Act that it is primarily a first-class legislated procedure for payment that exactly mirrors traditional payment methods**. Restricting its application creates an unnecessary two-path system, where, at the very least, as is the case in Victoria, a payment claim may legitimately include amounts under a contract that must be redacted from an adjudication application or determination. It is not sensible or desirable for legislation to depart from good practice for the purpose of satisfying interest groups.

We suggest the definition of variation be clarified to say "any variation to the contract by which the contract……..."

The phrase "agreed to by the parties" is not easy to interpret and adds nothing to the definition of a variation. Agreement to a variation may be by way of an instruction and its acceptance. It is up to a claimant to demonstrate that a variation claimed is a variation under the contract.

Types of decisions available to adjudicator

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

Response: Yes; Guarantees and undertakings are a common substitute for retention. If an adjudicator is empowered to decide on the release of a cash security as part of a payment claim, she/he should be empowered to order the release of a guarantee or undertaking that underwrites the same security.

2.2 Procedural issues

Referencing the BCIP Act on payment claims

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?

Response: No. The procedure defined by the Act should be compulsory for all construction contracts.

Reasons

The legislated payment process under the Act is correct, fair and reasonable and traditional in the industry. it is set within a framework of reasonable commercial payment terms.

Since a primary purpose of the Act is to encourage best industry practice it's use should be encouraged by the entire industry, including government, clients, contractors at all levels and superintending consultants.

Sadly, that has not happened. Government client and superintending departments, including building and engineering client departments, and purchasers, including all the major contractors, have positively discouraged the use of the legislated process to the point of intimidation. As a result, suppliers have either bowed to pressure of not positively engaging with the Act and superintending consultants have not seen it as their role to promote the Act to their clients, or have bowed to client and contractor pressure.

This leads us to conclude that voluntary invocation of the Act has not worked and that legislated procedure should be compulsory. The Act should not be triggered at the claimant's discretion.

This would encourage proper use of the Act, better process and avoid the charge of unexpected claims or "ambush claims".

Equally, Tax Invoices should not be accepted as a substitute for a Payment Claim. They are different documents that serve different purposes.

Question 8: Do you consider the current process of authorised nominating authorities appointing adjudicators appropriate?

If not, what alternate system would you propose?

Response: No the current system of private ANA's appointing adjudicators detracts from the operation of the Act. It leads to claims, real or imagined, of bias, places undue pressure on adjudicators and does nothing to facilitate the proper operation of the Act.

Either ANA's should be impartial non-profit organisations or the BCIP Agency should be the sole Agency for the certification of adjudicators, nomination of adjudicators for adjudications, collection, analysis and interpretation of data and the promotion and facilitation of the proper operation of the Act.

Reasons

"Claimant friendly" adjudicators and nominating authorities has been rumoured since the earliest days of the Act. Some of this perception may be based on no more than the imagination of aggrieved parties. As a former manager of a nominating authority I have no doubt that there is some truth in these claims. Claimants and their advisers do attempt to select "favourable" nominating authorities and there is no doubt that, when there is a commercial imperative to satisfy those who deliver the business, namely claimants, that unscrupulous people will attempt to manipulate the system to their advantage. Some will do no more than feed the rumour, but others have gone much further. We have direct knowledge of an adjudicator who was requested to change a decision; after refusing he was never nominated by that ANA again. Equally we have direct experience of an adjudicator contacting an expert (also an adjudicator) to commit fraud by creating a back-dated report to enhance an adjudication application.

Bias

There is no incentive for private enterprise ANA's to advise construction industry participants to adopt good payment practices so as to avoid payment disputes. ANA's are motivated by developing and maintaining a profitable business through adjudication turnover. It is not in the interests of ANA's to advise clients to adopt effective payment practices to avoid future disputes.

We know that ANA's and others advise parties discourage claimants from adopting best practice payment procedures in favour of using payment claims only as a curtain-raiser to payment disputes.

This situation was exacerbated by the BCIPA's well meaning attempt to avoid claims or perceptions of collusion between ANA's and claimants by restricting the advice that ANA's could give to the parties in relation to the operation of the Act. It resulted in alliances between ANA's and professional advisers, where the advisers are not regulated in any way with respect to the advice they offer clients and the industry. Like ANA's, professional adjudication advisers profit from fomenting disputes, not from promoting good practice.

Reporting and data gathering

Whilst ANA reporting to the BCIPA is reasonably onerous, it is subjective and the data made available to the the BCIP Agency to make focused or informed decisions that benefit the industry at large.

Proposal

ANA's must be neutral if they are to honestly facilitate the operation of the Act, including adjudication. It is difficult for private ANA's to give unbiased advice in relation to the operation of the Act and to engender confidence in the Act.

We recommend that the BCIP Agency claim facilitation of the Act by becoming the sole agency responsible for registering monitoring and nominating adjudicators for adjudication applications made under the Act. Alternatively, ANA's should be restricted to independent, non-profit organisations.

The effect of centralising or restricting ANA's would have many benefits for the industry, including:

Removing the pressure of profit and business success from influencing the outcome of adjudications;

Removing the pressure on adjudicators to produce “claimant-friendly” decisions;

Focusing more attention on the Act’s primary purpose of creating an orderly payment process;

Providing access to raw (big) data for better and more detailed analysis that would give the Agency and the industry better direction;

Giving the Agency the ability to positively influence the industry and become a driver of change and productivity.

Timeframes for making and responding to a payment claim

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?

Response: With the exception of the 12 month period for a progress payment the time frames for the payment and adjudication processes under the Act are achievable, reasonable and serve the purpose of the Act to support reasonable commercial terms of payment.

The time for serving a payment claim should be:

- **In the case of Progress Claims - 5 business days from the Reference Date;**
- **In the case of Substantial (Practical) Completion Claims - 3 months from the Date of Practical Completion;**
- **In the Case of Final Claims - 30 business days from the date of Final Completion.**

The exclusion of additional days between Christmas and New Year is reasonable. Easter, by definition falls between Friday and Monday. There is no reason to extend the excluded days beyond the promulgated public holidays.

Special or bank holidays should be specifically included, or excluded, as business days under the Act.

Reasons

The 12 month period for a payment claim is a clumsy attempt to deal with final payment claims. It can easily be resolved by categorising claims into the three types of progress claims under a contract.

This provision is a significant problem for respondents, especially in modern management contracts, where amounts paid to head contractors are contingent upon amounts paid to subcontractors.

Given the Act works around a 30 day payment cycle it is reasonable that payment claims for progress payments should be made within 5 business days of the reference date, with the exception of final claims.

Final claims fall, in effect into two categories - Claims after substantial (practical) completion and final claims after defects liability.

Respondents, quite reasonably, need to settle the final cost of a project within a reasonable time of completing the work, namely practical or substantial completion. If the parties have managed a contract properly during the course of the work there is no reason why a contract should not be settled within 3 months of completion of the work.

We know that Claimants have been advised not to make timely claims for variations and delay costs, but to wait until the work is complete before making a mega-claim. Such advice is unhelpful to the parties and the industry at large. Parties to a contract should be encouraged to administer their contracts diligently during the course of the contract.

A restriction of 3 months for a claim after practical completion would also prevent the so-called "ambush claim" where a Claimant can take 12 months to prepare a large claim that a respondent must respond to in 10 days.

A 3 month time-bar on completion claims (excluding matters where a dispute is in progress) will encourage better contract management.

Typically a final claim is made at the end of a defects liability period of 6 to 12 months. There is no reason why a final claim should not be settled within 30 days of the reference date for a final payment claim. It could be that this payment is strictly a release of retention, other than a resolution of matters where a dispute is in progress.

The three categories of payment claim, progress, completion and final can be readily defined in the Act.

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?

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

Response: No. As noted above, in Q 9, Claimants and Respondents allow claims to build up over time, either through deliberate tactics by one or other party for a perceived benefit, or through lazy or incompetent contract management.

Reasons

Best industry practice should ensure that both purchasers and suppliers manage variations, programming (including delays, disruption and extensions of time), latent conditions and other contractual claims, on a month to month basis.

By implementing the change suggested in response to Q9, above, the unsavoury practices would be stopped and poor contract management will not be rewarded.

Securing amounts payable pending an adjudication decision

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?

Response: Yes. The Subcontractor's Charges Act should be linked to the BCIPA to help protect claimants against a client's insolvency while they are working through the BCIPA process.

Alternatively, an amendment to the Act requiring a principal to withhold monies, similar to the NSW Act amendments should be introduced.

Reasons

We refer to our remarks in relation to the Subcontractors Act, above.

The current restrictions in the Act, preventing the concurrent use of the BCIPA and the Subcontractor's charges Act, require claimants to make a judgement as to which Act to use depending on whether they perceive their client is close to insolvency, usually without any knowledge other than rumour.

We have experienced a number of cases where the claimant has received a favourable award only to find the respondent has sought protection under administration or receivership. The outcome is the claimant has not only lost its payment but it is entirely responsible for the adjudication fees; a double whammy.

The SC Charges Act should be linked to the BCIPA to help protect claimants against their client's insolvency while they are working through the BCIPA process.

Alternatively, an amendment to the Act requiring a principal to withhold monies, similar to the NSW Act amendments should be introduced.

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

Response:

item 1: Substantial (Practical) Completion and Release and Waiver Documents

Response: The Act should have a default provision providing for a definition and trigger, upon the supplier's application, for the granting of a date of substantial completion.

Reasons: Whilst most main contracts have clear procedures to identify and award substantial or practical completion, many subcontracts that we have seen have no proper provisions for identifying and awarding this important milestone.

In our experience respondents improperly withhold the partial or final release of retentions either as a means of negotiating discounts on disputed amounts or to improve their cash position and profit margin.

As a result, in most cases, substantial completion is tied to a "release and waiver document" that ties completion to payment.

There is no practical reason that payment should be conditional on substantial Completion, other than the purchasers desire to finalise its accounts within a reasonable time of completing the work. This document is often used to force suppliers into accepting a final offer to settle a contract.

If the new timeframes proposed in Q.9 above are adopted, there is no reason for a purchaser to make a "Release and Waiver" a precondition to substantial completion.

Every contract should have a procedure for identifying and certifying substantial completion. The Act should have a default provision for establishing substantial (practical) completion.

Item 2: The Act should limit the time that retentions may be held for each subcontract.

Many subcontracts tie the date for practical completion, and hence the defects liability period, of individual subcontracts to practical completion of the main contract. It is another form of the outlawed "pay when paid" provisions. The outcome is that some subcontractors can wait years for partial and final release of retentions.

It can mean that 5% of a subcontractors turnover is tied up, all the time, in retentions. This can amount to a very substantial proportion of the capital available to a subcontractor to invest in its business.

These moneys would be much more effectively employed as capital by the affected subcontractors, rather than earning passive income for their clients.

There is no reasonable argument why the period that retentions are held should be more than is necessary to secure a subcontractors performance of a contract to the extent it is known at the time of practical completion.

Item 3: We understand from the industry that the loss of retention monies to insolvent clients it is very damaging to otherwise viable businesses. We would not object to the adoption of trust accounts or some similar form of securing suppliers moneys, effectively held in trust to secure specific performance.

Item 4: Alternative Securities - The Act should void any provision that prevents a supplier from offering a bank guarantee or similar surety as an alternative to cash retention.

We understand that some purchasers insist on cash retentions. The Act should void any clause that inhibits a supplier from providing security by way of a bank guarantee or similar surety.

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?

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

Response: In our experience, as a nominating authority and as an adviser to claimants and respondents, it is our opinion that the Act strikes a reasonable

balance between ensuring cash-flow and protecting parties entitlement to seek redress through the legal process.

Recent changes to the BSA financial regulations in relation to notification of a judgement debt add sufficient incentive not to withhold payment for tactical reasons.

Reasons

In our experience, as a nominating authority and as an adviser to claimants and respondents, it is our opinion that the Act strikes a reasonable balance between ensuring cash-flow and protecting parties entitlement to seek redress through the legal process.

Recent changes to the BSA financial regulations in relation to notification of a judgement debt add sufficient incentive not to withhold payment for tactical reasons.

The Courts have, by and large, given valuable clarity and guidance to the parties and adjudicators in the use and interpretation of the Act.

We would not recommend any change to the existing arrangements.

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?

No.

3. Application of the BCIP Act to contractual terms

Unreasonable timeframes in subcontracts

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

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

Response: Yes, we support the restriction of unconscionable time frames for notices and other matters that can be used for tactical contractual purposes.

We also recognise the need to encourage productivity and innovation in contract management.

We recommend the Act introduce a minimum notice period for extensions of time of 10 business days. This period would strike a balance between punitive timeframes, the need to maintain reasonable progress and the desire to encourage productivity and innovation in the industry.

Reasons

The timeframes for notification of claims for extensions of time and variations in some major contracts, of two to five days, are onerous to the point of being unconscionable.

Respondents typically make suppliers responsible for the management of extensions of time and variations on their contracts. Typically, the demands on the contractor are:

The contractor must recognise any change that is passed to it via an instruction (including the issue of a drawing).

Before commencing work on the instruction, the contractor must evaluate the cost and time impacts on its contract and notify the Respondent of its claim, together with its evaluation.

If the Contractor commences work before obtaining written approval of its claim, it forfeits any entitlement to the claim.

With current management and technology, this is a complex and resource-heavy process, with many interactions. It requires a Contractor to identify issues before they are in the field, make expert evaluations (ensuring that construction programs are always up to date) and relay this information to its Client.

Using traditional management and technologies, a notice period of 30 days would not be excessive.

This must be done in an environment where the Contractor is under pressure to maintain a strict construction schedule, at the risk of being penalised with substantial liquidated damages for delay.

Some responses to this issue, whilst effective for a claimant, generate significant extra cost and create unnecessary dispute.

On the other hand, there are new management techniques and technologies available that do make meeting tight time frames achievable. In our experience, Claimants are not willing to invest in any training or systems to help solve this issue.

It would not be a good thing to stifle innovation and productivity by rewarding those who resist change.

We recommend the Act introduce a minimum notice period for extensions of time of 10 business days. This period would strike a balance between punitive timeframes, the need to maintain reasonable progress and the desire to encourage productivity and innovation in the industry.

Question 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?

Response: Yes, we support the restriction of unconscionable time frames for notices and other matters that can be used for tactical contractual purposes.

We also recognise the need to encourage productivity and innovation in contract management.

We recommend the Act introduce a minimum notice period for variations of 10 business days. This period would strike a balance between punitive timeframes, the need to maintain reasonable progress and the desire to encourage productivity and innovation in the industry.

Reasons

Refer to Q.15 above.

We recommend the Act introduce a minimum notice period for variations of 10 business days. This period would strike a balance between punitive timeframes, the need to maintain reasonable progress and the desire to encourage productivity and innovation in the industry.

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?

Response: We support making a void provision in a construction contract where a purchaser terminates a contract with the intention or for the purpose of avoiding its payment obligations under the Act.

In those circumstances we agree that a claimant should be able to recover losses under the Act.

Adjudicators' jurisdiction could be extended to decide if a contract has been terminated to avoid its obligations under the Act (Q.17)

Question 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:

•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?

Response: We agree that the Act should specifically address preconditions to payment.

Unfair and unreasonable pre-conditions include:

> **Special 'slow delivery' requirements;**
>
> **The requirement for excessive detail and repeated information, such as currency of insurances.**
>
> **Enforcing Purchasers "in-house" payment systems, including pre-prepared Payment Claims and Payment Claim formats;**
>
> **Signing a 'Release and Waiver" document is a pre-condition to substantial completion.**

The role of Superintendent's (and Architect's) Certificates should be amended in standard form contracts to comply with and complement the BCIPA process;

All preconditions, including statutory declarations, should be preconditions to payment and not to an entitlement to serve a Payment Claim.

Substantial (Practical) Completion and Release and Waiver Documents

Response: The Act should have a default provision providing for a definition and trigger, upon the supplier's application, for the granting of a date of substantial completion.

The act should exclude, as a precondition to payment the signing of a "Release and Waiver" document.

The BCIPA should mandate the content and form of Payment Claims, through regulation. *(Attachment - Sample Payment claim)*

Reasons

In our experience, purchasers use a variety of contractual blocks, including preconditions, payment certificates, pre-estimates, special delivery instructions and other tactics to frustrate the operation of the Act.

it is also the case that superintending engineers and architects resist changing the Superintendent's or Architect's Certificate in traditional contracts, that they perceive as a loss of power and authority.

Every Claimant should be entitled to serve a payment claim as soon as a reference date arises.

We accept that some contractors require progress claims in specific form in order to ensure reasonable consistency.

However, it is not reasonable for a Respondent to "pre-prepare" pro-forma payment claims for Claimants and insist on particular methods of delivery. It leads to Claimants being required to own or operate a number of discrete systems for payment. This is onerous and time-consuming for Claimants. Claimants should be entitled to use their own systems and methods to control their business, including payment.

We do believe that the BCIPA should develop Payment Claim content formats, by regulation, that Claimants should be required to conform to.

This would obviate the need for Respondents to insist on "in-house" formats, it would overcome the problem of using inappropriate tax invoices as payment claims and it would bring consistency to the whole industry.

There is no practical reason that payment should be conditional on substantial completion, other than the purchasers desire to finalise its accounts within a reasonable time of completing the work.

If the new timeframes proposed in Q.9 above, there is no reason for a purchaser to make a "Release and Waiver" a precondition to substantial completion.

Every contract should have a procedure for identifying and certifying substantial completion. The Act should have a default provision for establishing substantial (practical) completion. (See also Q.12)

With respect to Superintendent's (and Architects) Certificates, they would fulfill a much more valuable role if they were required to be served on or before a reference date and were required only to certify that work done meets the specified and contractual requirements. Any association with the value of work should be separated from Certificates and dealt with as part of a Payment Schedule regime.

This may be a matter for the professional associations and Standards Australia to address.

The Act should not protect other than the most essential pre-conditions and even then they should be pre-conditions to payment, not to the service of a payment claim.