

Paul J. Hick
Adjudicator Reg. No. [REDACTED]

16 June 2014

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

BY EMAIL: thlgc@parliament.qld.gov.au

Dear Research Director,

Submissions on the Building and Construction Industry Payments Amendment Bill 2014

My name is Paul Hick. I am a registered adjudicator in Queensland of considerable experience. I am also a construction lawyer and have been involved in the construction industry in various roles for over 30 years. A brief biography is attached.

I write to you to make submissions in respect to the Building and Construction Industry Payments Amendment Bill 2014 ("**the Bill**") presently before the committee. My submissions do not attempt to argue or reopen issues that were dealt with by the Wallace Report. Rather, I have considered the Bill and make submissions in respect to the drafting of same in the context of what I understand to be the intent of the amendments. Set out in the numbered paragraphs below I have identified the relevant section of the Act in terms of the Bill having amended it. That is to say, for example, a reference to s17(2)(d) is a reference to the effect of the amendment to the Act by clause 5 of the Bill.

1. S17(2)(b)- should also delete the word 'and' after a semicolon.
2. S17(2)(c)- should also add the word 'and' after a semicolon.
3. S17(2)(d) and 18A(3)– the definition of complex payment claim is not simple enough. Even for sophisticated claimants it will not be a simple matter to classify whether a payment claim should be classified as complex without some better definition of what a time related claim is. Further, many industry members will not understand what a latent condition claim is. In my view it is just too problematic to split claims between standard and complex in that way. Either just set a monetary limit only to define the difference or else treat them all the same and stipulate the time frame for delivery of a payment schedule at somewhere between the extremities currently stated in the proposed s18A.
4. S17A – there is inconsistency of terms. Sometimes the 'relevant construction contract' is referred to and sometimes it is 'the contract'. The context appears to indicate the two terms are used interchangeably with the same meaning however, consistency would be better.

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5. S17A(2), (3) & (4) – does the term ‘final payment’ include a claim for retention. If it does not then it should. With retention, the work may not have been carried out for 12 months but the retention is to be claimed in the final claim. The return of security is often all that is left to be claimed in the final claim. This should be clarified in the definition of final payment. Further, if the definition of final payment does include a claim for retention, can this include return of security (bank guarantee) as well or only cash retentions.
6. S17A(4) – the definition of defect liability period is problematic. It will clash with the terms of most contracts and whilst the Act will take precedence, the definition needs to be clearer and include a definition of practical completion to mark the commencement of the defects liability period and include a requirement for the respondent to notify the claimant when the defect liability expires. Many construction contracts differ with respect to defining when the defect liability period begins and ends and this can vary substantially between head contracts and subcontracts. Most defects liability periods begin at practical completion however, even defining when practical completion occurs varies wildly between contracts. It is often defined by the completion of not only construction work but delivery of a long list of laundry items including delivery of statutory declarations, warranties, manuals etc. Further, in the case of subcontracts, practical completion and defect liability periods can sometimes be tied to the head contract. For example, the defect liability period may commence when the subcontract works are at practical completion but may not end until 12 months after the head contract works reach practical completion. To further complicate the problem, a subcontractor will often have no idea when the defect liability period under the head contract begins or ends and will be reliant upon receiving that advice from the head contractor, who often does not deliver it. Consider then the case of, for example, a concreter on a large project. The concrete subcontract works reach practical completion early in the project however, with say 8 or 12 months further to run before the project as a whole reaches practical completion and then a further 12 months of defect liability period, the concreter cannot make their final claim until 20 to 24 months after they last carried out any work. Further, the head contractor does not notify the concreter when the head contract reached practical completion and therefore the concreter has no way of knowing when the defects liability period actually expires. Making it virtually impossible to work out when the 28 days period in s17(3)(b) starts and ends. As a solution, perhaps if the 28 day period in s17(3)(b) is to commence once the respondent serves notice on the claimant that the defects liability period is complete.
7. S18A – there is inconsistency of terms. Sometimes the ‘relevant construction contract’ is referred to and sometimes it is ‘the contract’. The context appears to indicate the two terms are used interchangeably with the same meaning however, consistency would be better.
8. S19(2) and (3) – would it not be better for consistency with terms already defined under the Act to just say that the respondent becomes liable to pay the claimed amount to the claimant on the ‘due date for payment’.

9. S20A(1) doesn't make sense. Perhaps if it read, 'This section applies if a claimant intends to' and in subparagraphs (a) and (b) delete 'may'.
10. S20A(4)(a)(i) and (ii) do not appear correct. They should refer to section 20A(2) and (3) as the circumstances the court should be satisfied with.
11. S24(4) – the original s24(4) has been omitted however, nothing has replaced it to cover circumstances where no payment schedule is given in response to a standard payment claim. Is it the intent that the respondent will be entitled to give an adjudication response in those circumstances even though the new s24(4) says that the respondent cannot include any reasons for withholding payment in the response that were not included in the payment schedule. This has a bearing on the time in which an adjudicator must start to decide the application under s25A.
12. S24A(8) – there is no sanction for the respondent failing to serve the response on the claimant and the adjudication of the application must go forward in any event. The respondent's failure to serve the response can prejudice the claimant if further submissions are requested. There needs to be a consequence for failing to serve the adjudication response. Perhaps, the response should not be taken into account by the adjudicator if not served on the claimant within time?
13. S24B(6) – again there is no sanction for failure to comply. Perhaps, the claimant's reply should not be taken into account by the adjudicator if not served on the respondent within time?
14. S25(7) – the consequences of incorrectly identifying a complex payment claim are extremely harsh. Particularly given the operation of s17(4), and a17A(2), (3) & (4) and the potential for the claimant to lose the right to make a further, correctly identified payment claim. I repeat my comments above in respect to ss17(2)(d) and 18A(3)–
15. S25A(2)(b) – the term 'claimant's reply' has already been defined in s24B(2) and therefore this provision should read "the period within which the claimant may give a claimant's reply to the adjudicator".
16. S25A(2) and (3) – what about the scenario where the respondent failed to deliver a payment schedule at all and therefore is not entitled to deliver an adjudication response?
17. S25A(3)- should this not say 15 business days after '**the earlier of**' similar to s25A(2)?
18. S262)(c)- is this broad enough to capture the 'claimant's reply'?

I thank you for your consideration of these submissions.

Yours Faithfully


Paul J Hick

Adjudicator 

About the Author



Paul J Hick

Construction Lawyer

Adjudicator

Building Consultant

Paul is an experienced construction lawyer and commercial litigator with a career of more than 30 years in the construction and legal industries. Paul's long history of involvement in the building and construction industry began in 1981 with his employment as a trades assistant which progressed to apprentice carpenter, qualified carpenter, subcontractor, builder, designer and supplier to the building industry. In February 2004 Paul was admitted as a solicitor of the Supreme Court of Queensland after completing a law degree, post graduate studies in legal practice and approximately 18 months full time articulated clerkship. From there Paul developed a successful construction law practice in North Queensland and more recently has relocated to Hervey Bay on Queensland's Fraser Coast. Paul is experienced in many aspects of construction and construction management and is currently augmenting that practical experience with study of masters degrees in business administration and project management. As a lawyer, Paul has extensive experience in all aspects of construction law including, contract negotiation and drafting, joint ventures, alliance and partnering arrangements, dispute resolution including adjudication, mediation and litigation. Paul has acted on a wide variety of matters in the Magistrates, District and Supreme Courts as well as in the QCAT and its predecessor the CCT including disputes involving developers, contractors, subcontractors, designers, civil, commercial and domestic construction and reviews of BSA decisions and actions. Paul undertook the necessary study and in or about late 2005 gained registration as an adjudicator in Queensland under the Building and Construction Industry Payment Act 2004. More recently, Paul has gained accreditation as an adjudicator under security of payment legislation in New South Wales and South Australia. Paul has undertaken a large number adjudications and is a strong supporter of the security of payment system. He addresses industry groups and works to increase awareness and education on the adjudication process. He is currently studying for post graduate masters degrees in Masters of Business Administration and Masters of Project Management.