

16 June 2014

The Research Director
Transport, Housing and Local Government Committee
Parliament House
George Street
Brisbane Qld 4000
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Your ref Building and Construction Industry Payments Amendment Bill 2014

Our ref Mining & Resources and Construction & Infrastructure Committees

Dear Research Director

Building and Construction Industry Payments Amendment Bill 2014

Thank you for providing the Queensland Law Society with the opportunity to provide comments on the *Building and Construction Industry Payments Amendment Bill 2014* (the Bill).

The Bill has been considered by the Society's Mining & Resources and Construction & Infrastructure Committees, which have contributed to this response.

The comments of the Society are contained in the following Schedule.

If you have any queries regarding this submission please contact our Principal Policy Solicitor, [REDACTED] on [REDACTED] or via email on [REDACTED] in the first instance.

Yours faithfully



Ian Brown
President

Schedule - Comments on *Building and Construction Industry Payments Amendment Bill 2014* (Qld)

Proposed amendment	Explanation of effect of proposed amendment	Suggested drafting amendment
Commencement and Transitional Provisions	<p>In announcements made in March and April 2014, the Queensland Government indicated that the amendments to the <i>Building and Construction Industry Payments Act</i> (the Act) would only apply to construction contracts entered into after 1 September 2014 (apart from the amendments relating to the role of ANA's and the adjudication registry which would commence shortly after proclamation).</p> <p>The Bill, however, does not provide any commencement information or transitional provisions in this regard. As currently drafted, the amendments would apply to all construction contracts, not just those entered into after 1 September 2014.</p>	If Parliament did not intend for the amended Act apply to contracts presently on foot, transitional provisions need to be added to the Bill so as to provide that the amendments will only apply to construction contracts entered into after the commencement date of the amendments.
<p>Section 18A – Time requirements for payment schedules</p> <p>Section 15(1)(b) – Due date for payment</p>	<p>The amendments to the timeframes for responding to a complex payment claim produce some inconsistencies with section 15(1)(b) of the Act, and the <i>Queensland Building and Construction Commission Act 1991</i> (the QBCC Act), sections 67W and possibly 67U.</p> <p>Under the QBCC Act, a contract that requires payment of a payment claim after 15 business days (in the case of head contracts) and 25 business days (in the case of subcontracts), this will be void (sections 67W and 67U respectively).</p> <p>Under the Act, a payment schedule in response to a complex payment claim is not due until 15 or 30 business days after the claim is served (section 18A(3)).</p> <p>If the QBCC Act applies, payment would be due before the payment schedule is due under section 18A(3) of the Act.</p> <p>Further, even if a payment provision in a contract was not void under the QBCC Act and the</p>	There needs to be some alignment between the QBCC Act and the Act in relation to payment provisions.

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	<p>contract provided that payment was due within 15 business days after the claim was served, payment would also have to be made before a payment schedule is due in the case provided for in section 18A(3)(b)(ii) of the Act where a payment schedule is due within 30 business days after the claim is served.</p> <p>In these circumstances, a respondent will need to assess a complex claim and make payment before the payment schedule is due.</p>	
<p>Section 20A – Notice required before starting proceedings to recover unpaid portion as a debt</p>	<p>This section applies to situations where:</p> <ul style="list-style-type: none"> a) a respondent does not serve a payment schedule within time, and fails to pay the whole or part of the claimed amount on or before the due date; or b) a respondent serves a payment schedule within time but fails to pay the whole or part of the claimed amount on or before the due date. <p>The new section provides that a claimant cannot start proceedings unless:</p> <ul style="list-style-type: none"> a) the claimant served a notice on the respondent within 20 business days of the due date of payment; and b) the notice gives the respondent a chance to submit a payment schedule within 5 business days of receiving the notice; and c) the respondent does not serve the payment schedule within the time required under (b). <p>The provision is circular where a payment schedule is given, but the whole or part of the scheduled amount is not paid.</p> <p>The provision does not account for a situation where a respondent does serve a valid payment schedule (whether initially, or following a notice under either the new s20A or the current s21(2)), but fails to pay the whole or any part of the Scheduled Amount. In such a case, s20A(2)(c) will</p>	<p>Sections 20A(1)(b) and 20A(4)(a)(ii) should be deleted so that a claimant has an immediate right to start proceedings where a payment schedule has been given but the scheduled amount is unpaid.</p>

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	<p>preclude a claimant from starting proceedings to recover an unpaid Scheduled Amount.</p> <p>The issues are as follows:</p> <ol style="list-style-type: none"> 1. What happens if the respondent provides a second payment schedule but still fails to pay the whole or any part of the scheduled amount by the due date? Does that prevent the claimant from starting proceedings to recover the scheduled amount of the first payment schedule? If so, what would happen if the respondent does not pay the scheduled amount of the second payment schedule? Presumably the provisions under s 20A are not intended to apply because the provisions in s 20(1) appear to be relevant to the first payment schedule, not the second payment schedule, so s 20(2) may not apply. If that is the case, then it appears the claimant cannot recover the unpaid scheduled amount of the second payment schedule via court proceedings. 2. On the other hand, if the provisions of s 20(1) apply to a second payment schedule (given the changes to s20(1)(b)), then arguably the claimant would have to go through the same process under s 20A before commencing proceedings if the respondent did not pay the scheduled amount of the second payment schedule. That means the respondent could issue a third payment schedule after receiving notice from the claimant of its intention to commence proceedings in relation to the second payment schedule, which would again prevent the claimant starting proceedings. 3. If a respondent provided a second payment schedule, what happens if that payment schedule does not mirror the first payment schedule or has a different scheduled amount? Does the second payment schedule supersede the first payment schedule? 	
Section 20A	<p>Clarification is also requested in relation to the procedure under section 20A. Section 20A requires a notice before commencing proceedings to recover an unpaid amount. Of concern is its application to the case where a payment schedule has not been delivered.</p> <p>If a notice is delivered by a claimant under s. 20A(2) and a respondent then delivers a payment</p>	Clarification of section 20A

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	<p>schedule (within the requisite 5 business days), there is not a definitive statement that a claimant (having given the notice to elect to go to court) can then elect to change course and proceed to adjudication.</p> <p>If a claimant cannot change course and proceed to adjudication, the claimant has no route to follow under the BCIPA because it has received a payment schedule. A clear statement is required that the claimant can upon receipt of a payment schedule in response to a notice under s. 20A can elect to proceed to adjudication.</p>	
Section 19 and section 20A	<p>Section 19 provides:</p> <p><i>"(1) This section applies if a respondent served with a payment claim does not serve a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant.</i></p> <p><i>(2) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates."</i></p> <p>There is some ambiguity between section 19 and section 20A in the situation where no payment schedule is given under section 18, but a second chance payment schedule is given under section 20A. In particular, it is not clear whether the deeming provision in section 19(2) applies notwithstanding that a second chance payment schedule is given under section 20A.</p>	It should be clarified that if a second chance payment schedule is given under section 20A, then section 19 does not apply.
Section 100 – effect of part 3 on civil proceedings	<p>Presently in Queensland, if an adjudication decision is found by the Supreme Court to be affected by jurisdictional error it is regarded as no decision at all.</p> <p>The reforms propose to rewrite this element of the common law by providing that if only part of the adjudicator's decision was affected by jurisdictional error, that part of the decision is severed from the remainder of the decision.</p> <p>While this "saving provision" may assist some claimants in the short term, it is likely that in the long run this provision will introduce a new wave of argument and litigation. It will be difficult for</p>	Rely on common law position and remove proposed amendment

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	<p>a reviewing court to accurately identify the parts of the decision influenced by the error.</p> <p>Furthermore this amendment is inconsistent with a large body of administrative law precedence and put further distance between Queensland and the other security of payment regimes.</p>	
Meaning of a "time related" cost	<p>The Bill distinguishes between standard payment claims and complex payment claims. A payment claim will be complex if it includes a "time-related cost".</p> <p>The meaning of a "time-related cost" is not given in the Bill.</p> <p>The term may be broad enough to encompass any variation involving time related costs.</p>	Insert definition of time-related cost
Section 24B(2) and section 25A(3)(a)	<p>Members have raised the issue that section 25A(3)(a) may require the adjudicator to decide the adjudication application within 15 business days after the adjudicator receives an adjudication response (provided the adjudicator did not receive a claimant's reply). However section 24B(2) enables the claimant's reply to be given to the adjudicator within 15 business days after receiving a copy of the adjudication response which could be 2 days after the adjudicator is required to decide the application.</p> <p>See diagram A following this table.</p> <p>This issue bears consideration as to whether section 25A(3)(b) is sufficient.</p>	The Bill should be amended to ensure that an adjudicator is not required to deliver a decision before the opportunity for submissions are closed.
Section 25B – extension of time requirements by adjudicator	<p>The adjudicator may have an additional 5 business days to decide an application if, in the opinion of the adjudicator, the claimant and respondent <i>attempt, but fail, to reach agreement</i> under section 25A(4).</p> <p>It is not immediately apparent why the words "attempt, but" are necessary. The word "attempt" is also unclear in what it requires.</p> <p>The intent of the section seems to be to empower the adjudicator to have additional time where one but not both parties are in agreement to extending time. If that is the case, the words "attempt, but" are unnecessary</p>	Remove the words "attempt, but" in this section

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Diagram A

