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CONSTRUCTION ALERT SIGNIFICANT REFORMS FOR THE *BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004 (QLD)*

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INTRODUCTION

The Department of Housing and Public Works (**Department**) has today released a fact sheet* which outlines significant changes to the *Building and Construction Industry Payments Act 2004 (Qld)* (**BCIP Act**). The changes, which represent the most far-reaching (and the most respondent-friendly) amendments to the BCIP Act since it came into operation, are likely to come into effect on 1 September 2014.

The proposed reforms fall into three broad categories:

- Changes to time frames.
- The respondent's right to include all reasons for withholding payment in the adjudication response.
- Changes to the appointment of adjudicators and the adjudication process.

CHANGES TO TIME FRAMES UNDER THE BCIP ACT

The following changes are foreshadowed in relation to the time frames for compliance with certain obligations by claimants and respondents under the BCIP Act:

- Whereas currently a claimant is entitled to submit a payment claim within the period of 12 months after construction work was last carried out or the related goods and services were supplied, under the reforms, a claimant will only be entitled to submit a payment claim within 6 months of when the construction work was last carried out or the related goods and services were supplied.

This will have obvious implications for claimants who must be aware of the significantly reduced timeframe in which they are entitled to submit a payment claim.

- If the payment claim is a final payment claim under the construction contract, it must be made by the claimant within the later of the time specified in the contract, or 28 days after the expiry of the defects liability period.

This severely curtails the current position which enables a claimant to submit a final payment claim at any time so long as it has a valid reference date from which to submit it.

- Payment claims which claim more than \$750,000 or involve claims for latent conditions or time-related costs, will be categorised as 'large or complex' claims.

Whereas a respondent presently has 10 business days to provide a payment schedule in respect of any payment claim, a respondent to a 'large or complex' claim will have 15 business days. The time for the provision of payment schedules in respect of payments claims which are not 'large or complex' claims will remain as 10 business days.

- If a payment claim is provided more than 91 days after the reference date arises under the construction contract, the respondent will be entitled to serve a payment schedule in respect of the payment claim within 30 business days.

This will enable a respondent to more adequately respond to what the industry has commonly referred to as 'ambush claims'. It is not clear however, whether the 91 days will run from the first unused reference date under the construction contract from which the payment claim could have been made, or if the accrual of subsequent reference dates resets the clock.

- Whereas a respondent presently has 5 business days to provide an adjudication response to an adjudication application, under the reforms this period will be extended to 10 business days, and 15 business days for adjudication responses to 'large or complex' claims. In addition, it appears that an adjudicator will be empowered to extend the time to submit an adjudication response for 'large and complex' claims for an additional 15 business days.

These changes represent a severe swing towards a respondent-friendly operation of the BCIP Act. That is illustrated by the potential situation in which a respondent that has been served with a 'large or complex' claim potentially may have 30 business days to prepare and provide its payment schedule and a further 30 business days in which to prepare and provide its adjudication response. Conversely, it remains to be seen whether the 10 business day period in which a claimant has to prepare and provide an adjudication application will be the subject of any amendment.

ADDITIONAL OPPORTUNITY FOR RESPONDENTS TO PROVIDE REASONS FOR WITHHOLDING PAYMENT

Presently, a respondent may only provide submissions in support of reasons (if any) for withholding payment which were provided in the respondent's payment schedule and may not raise any new reasons for withholding payment in the adjudication response. An adjudicator is not empowered to consider any additional reasons, however valid, which are raised for the first time in an adjudication response.

Under the reforms, a respondent may raise any reason for withholding payment either at the payment schedule or adjudication response stage. However, claimants will have a right of reply to new reasons raised. No indication has been provided of the time allowed to the claimant to respond to new reasons raised by a respondent in an adjudication response. The policy underpinning this change is explained in the Department's fact sheet as a response to the fact that respondents presently have only 10 business days to provide a payment schedule. In light of the fact that the reforms substantially increase the periods in which a respondent may provide a payment schedule in relation to a 'large or complex' claim, respondents

will be seriously advantaged by this particular reform and especially so if claimants are not provided with an equally generous opportunity to respond to new reasons for withholding payment raised in an adjudication response.

APPOINTMENT OF ADJUDICATORS AND THE ADJUDICATION PROCESS

Presently, a claimant is required to make an adjudication application to an Authorised Nominating Authority (**ANA**), which is charged under the BCIP Act with referring the adjudication application to a registered adjudicator for determination.

Under the reforms, ANAs will be effectively abolished and all adjudication applications will be required to be made to an 'Adjudication Registry' which is established by the Queensland Building and Construction Commission.

The Department's fact sheet indicates that adjudicators will be more strictly monitored in relation to their performance.

Adjudicators will also be entitled to be paid for a decision that they do not have jurisdiction under the BCIP Act to make a decision. This increases the risk of exposure to costs for claimants which make adjudication applications in circumstances where a jurisdictional error may defeat their ability to do so.

HOW WILL IT AFFECT YOU?

The Department's fact sheet indicates that construction contracts which are entered into before 1 September 2014 will not be affected by the proposed reforms.

Adjudication applications submitted after 1 September 2014 however, must be made to the Adjudication Registry established by the Queensland Building and Construction Commission.

Notably, the time frames under the BCIP Act will be significantly extended, and not fixed in cases where the payment claim is a 'large or complex' claim. The obvious implication is that the period in which claimants can expect to receive payment for adjudicated amounts will dramatically lengthen.

The reforms will significantly alter the landscape in relation to the operation of the BCIP Act with which claimants and respondents have become familiar over the last 10 years. The changes will necessitate amendments to strategy both for claimants seeking to recover progress payments and for respondents seeking to defend against them.

Thomson Geer will provide a further update once more information comes to hand.

*Access to the Department's fact sheet is available [here](#).

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