

PAYMENT CLAIMS UNDER BUILDING CONTRACTS

Introduction

In October 2017 the Queensland Government passed the Building Industry Fairness (Security of Payment) Act (“**BIFSOPA**”).

The two main reforms included in BIFSOPA are:

1. The introduction of a project bank account regime (initially for government building contract between \$1m and \$10m);
2. Changes to the security of payment regime presently governed by the Building and Construction Industry Payments Act 2004 (Qld) (“**BCIPA**”).

Preliminary Comments

This paper only deals with the second reform referred to above; changes to the security of payment regime.

What we are concerned with is a statutory procedure for the recovery of money under building contracts.

The procedure runs parallel with and is not a substitute for the parties’ contractual rights. Regardless of the outcome of any procedure employed under BCIPA or BIFSOPA, the parties are entitled to pursue their contractual rights/claims.

Commencement of the New Regime

It was initially mooted that the new payment claim regime would commence on 1 July 2018.

That was deferred with the new regime to commence on **17 December 2018**.

The Pre-December 17, 2018 System - The Building and Construction Industry Payments Act 2004 (BCIPA)

This article is not intended to provide a detailed analysis of how BCIPA worked (and how BIFSOPA will work).

In short, BCIPA applies to construction contracts with a few exceptions, for example, domestic building work for a resident owner. Construction work and related goods and services are defined in sections 10 and 11 respectively.

BCIPA allows a person who has performed work under a contract to make a claim from each reference date.

The payment claim must:

1. Identify the construction work or related goods and services;
2. State the amount claimed; and
3. State it is made under BCIPA,

The respondent to the claim must deliver a payment schedule in response to the payment claim within the timeframes provide for in BCIPA; 10 days for a standard claim and 15 or 30 days for a complex claim (a claim for more than \$750,000) depending upon when the payment claim was delivered (whether more or less than 90 days after the reference date).

The payment schedule must:

1. Identify the payment claim;
2. State the amount of the payment the respondent proposes to make; and
3. State why the scheduled amount is less than the amount claimed.

If the respondent does not serve a payment schedule, they become liable to pay the amount claimed and the claimant can recover this as a debt through the courts or an adjudication application. A claimant cannot start a proceeding in a court without giving a further 5-day notice. This allows the respondent a “second-chance” to deliver a payment schedule.

BCIPA then provides for an adjudication process. The claimant files an application within timeframes stated in BCIPA and the respondent then delivers an adjudication response, also within specified timeframes.

The adjudication response can only include reasons for non-payment which were included in the payment schedule, unless it is a complex claim (in which case additional reasons may be included).

The adjudicator must decide:

- (a) The amount of the progress payment to be paid by the respondent to the claimant;
- (b) The date on which any amount became or becomes payable; and
- (c) The rate of interest payable on any amount.

In deciding these things, the adjudicator must consider only the following matters:

- (a) The provisions of BCIPA and, to the extent they are relevant, the provisions of the [*Queensland Building and Construction Commission Act 1991*](#);
- (b) The provisions of the contract;
- (c) The payment claim and any submissions and other documents properly made;
- (d) The payment schedule and any submissions and other documents properly made;
- (e) The results of any inspection.

If the respondent does not pay the adjudicated amount, the claimant can ask for a certificate and file that as a judgment in the appropriate court.

Fundamentals of the Previous Regime

The fundamental elements of the above system are:

1. Payment claims for each reference date under the contract. The payment claim must include a notation that it is made under BCIPA.
2. The requirement for a payment schedule if the respondent is not going to pay the amount claimed.
3. If no payment schedule is given, the requirement for a further 5-day notice before further action can be taken by the claimant.
4. For a standard claim, the respondent may only rely upon reasons for withholding payment stated in the payment schedule.
5. The parties are limited to any documents (submissions, statutory declarations and the like) properly made and in accordance with the strict time limits under BCIPA.

From 17 December, 2018

The New Payment Claim Regime under the Building Industry Fairness (Security of Payment) Act 2017 (BIFA)

BIFA will apply to payment claims served on or after 17 December 2018 (it does not matter when the contract was entered into). A payment claim served before 17 December 2018 will still be governed by BCIPA.

The definitions of construction work and related goods and services have not changed.

Section 67 – the definition of reference date is the same except it now expressly provides that if a contract is terminated, the last reference date will be the date of termination (unless the contract provides for a reference date surviving beyond termination).

Section 68 – a payment claim must identify:

- (a) The construction work or related goods and services;
- (b) State the amount claimed;
- (c) Request payment; and
- (d) Include any other information required by regulation.

The request for payment requirement is satisfied if the document bears the word “invoice”.

Note there is no longer a requirement that the payment claim include a notation that it is made under the Act.

The requirements of a payment schedule are as per BCIPA. Although timing has changed.

The payment schedule must be delivered within the shorter of the following times:

- (a) The time provided for in the contract to respond to a payment claim;
- (b) The time provided for in the contract to pay the amount claimed in the payment claim;
or
- (c) 25 business days.

Note it is an offence to neither pay nor deliver a payment schedule!

If the respondent does not pay the amount claimed or the scheduled amount, the claimant can recover the amount in the relevant court or through adjudication.

The adjudication procedures are largely the same with some amendments to timeframes such as extending the time to file an adjudication application.

However, there is no mechanism for including new reasons (not included in a payment schedule) and the respondent cannot give an adjudication response if it did not give a payment schedule.

Major Differences Between the BCIPA Regime and the BIFA Regime

1. Under BIFA there will be no need for the payment claim to include a notation that it is a payment claim under BIFA. A demand for payment, for example, an invoice is enough.
2. Under BIFA there will be no requirement to give a second chance 5-day notice before taking action in the absence of a payment schedule.
3. The claimant will have more time to file an adjudication application
4. There is no mechanism under any circumstances for a respondent to rely upon reasons for non-payment that are not included in a payment schedule.
5. The date of termination of the contract will give rise to a new reference date.

Under the new regime, there may be a significant risk of missing the need for a respondent to deliver a payment schedule. The payment claim will not make it obvious that it is a payment claim and there is no longer a second chance to deliver a payment schedule.