



QUEENSLAND MAJOR
CONTRACTORS ASSOCIATION

Queensland Major Contractors Association

Reform of the
*Building and Construction
Industry Payments Act 2004*

Submission

13 April 2010

Executive Summary

This submission is based on interviews with QMCA Members from December 2009 to March 2010 and is provided by the QMCA to the Policy Sub-committee of the Queensland Building Services Board for consideration as part of its 2010 review of BCIPA.

Summary of key observations on the Act by QMCA Members:

- The Act has been successful in addressing cash flow issues that existed in the construction industry prior to its introduction.
- The Act is overly claimant friendly.
- The Act has encouraged administrative improvements by respondents in dealing with payment claims.
- The Act has become the main form of dispute resolution.
- Some members favoured maximum and minimum amounts for payment claims under the Act but there was no agreement on what these amounts should be.
- Some ANA's are too claimant friendly.
- Greater clarity is needed regarding the service of payment claims.

Summary of recommended changes to the Act:

- Claims under the Act should be limited to progress payment claims and should exclude disruption claims, prolongation claims, damages claims and claims related to changes in regulatory requirements.
- Time periods for responding to payment claims should be extended for large claims.
- Shorten the 12 month time period for bringing a payment claim under the Act.
- In the case of claimants who may not be able to repay sums payable to them under the Act, provision should be made to allow respondents to pay sums payable under the Act into a trust account pending the final determination of the dispute.
- Allowance should be made by adjudicators for defective work.
- The parties should be allowed to agree on an ANA in their construction contract.
- The meaning of the right to claim a progress payment '*from each reference date*' under section 12 of the Act should be clarified.
- Require claimants to give prominence to the endorsement that the payment claim is made under the Act by way of a notice in a prescribed form attached to the first page of the claim.
- Neutral ANA's are preferable to commercial ANA's.

Introduction

This submission is provided by the Queensland Major Contractors Association, Industrial Organisation of Employers (**QMCA**) to the Policy Sub-committee of the Queensland Building Services Board for consideration as part of its 2010 review of the *Building and Construction Industry Payments Act 2004* (Qld) ('**Act**' or '**BCIPA**').

The Act has been in operation in Queensland for over 5 years. Most QMCA Members have had experience with the Act and it is one of the most important pieces of legislation affecting the building and construction industry in Queensland.

QMCA Members have been both the recipients of payment claims under the Act and respondents in adjudications and have also occasionally used the Act to make payment claims and to pursue claims in adjudication against principals. This makes QMCA Members uniquely qualified to comment on the Act.

In this submission the QMCA sets out its position on the Act, based on the experiences of its members, and those aspects of the Act which are working well and those aspects of the Act with which QMCA Members are dissatisfied and would like to see amended. The QMCA believes that this submission provides a well balanced and considered perspective on the operation of the Act.

A number of common themes have emerged from discussions with QMCA Members which form the basis for the proposals for reform of the Act set out in this submission.

The QMCA

The QMCA is an industrial organisation of employers created under the *Industrial Relations Act 1999* (Qld). It is a proactive organisation representing the major general construction contractors of Queensland.

QMCA's members comprise local and national organisations that bring with them a diversity of services in the civil and building construction, resource and specialist services fields. The QMCA is dedicated to improving the efficiency and sustainability of the construction industry in Queensland and believes that this will be achieved by working closely with Government, strategic partners and industry organisations to shape the future of the Queensland construction industry and drive innovation and improvement.

A list of QMCA Members is attached at **Annexure 1**.

Methodology used to prepare this submission

This submission is based on interviews with QMCA Members.

The interviews were conducted over a 4 month period from December 2009 to March 2010 by a team from Minter Ellison Lawyers, comprising:

- **Greg Richards (Special Counsel, Minter Ellison and Executive Secretary of the QMCA);**
- **Jennifer McVeigh (Consultant, Minter Ellison); and**
- **Allie Ford (Lawyer, Minter Ellison).**

Minter Ellison interviewed 14 out of 17 QMCA Members (all members were given an opportunity to participate in the interview process). All members interviewed were asked the same questions. The questions were prepared by Minter Ellison. A copy of those questions is attached as **Annexure 2**.

Each QMCA member was interviewed separately. No member was informed of the answers of any other member prior to answering the questions posed to them by Minter

Ellison. The answers to the questions were recorded in writing. Common themes emerging from the answers to the questions by QMCA Members form the basis of this submission. Members were also encouraged to proffer any views on the Act that were not covered by the questions.

This submission was prepared by the Minter Ellison team on behalf of the QMCA. A draft of this submission was circulated to the QMCA Executive and to all QMCA Members during March 2010. Comments were sought on the draft and comments received were considered for incorporation into the final submission where appropriate.

The submission represents the collective position of the QMCA Executive and QMCA Members on reform to the Act.

Observations on the Act

Experiences

Member's experiences vary due to the nature of their business, client base, subcontractor engagement and culture.

All members see the system as overly claimant friendly. Most claimants are successful and succeed in recovering the majority of their claims. Most respondents pay the adjudicator's fees.

Object of the Act

All members recognised that the Act had addressed cash flow problems caused by principals who had not made regular progress payments to which contractors and suppliers were entitled.

Some respondents thought that subcontractors needed further education about how the Act operates.

However, there was consistent complaint that the Act was being used to achieve more than mere payment of progress claims; that it was being used as a tactical vehicle for recovery of claims arising from complicated contractual disputes, claims made long after the work was finished and post-termination claims.

Best features of the Act

While most members who frequently receive claims are not happy with the very tight time frames, they acknowledge that they have improved their own administrative processes to avoid missing deadlines for payment schedules.

While some members see the Act as a quick means of dispute resolution, others have incurred significant costs – both externally and internally – dealing with claims that are perceived as tactical and not mere progress claims.

A new system of dispute resolution

The increase in use of the Act has seen a drop off in all other forms of dispute resolution. It appears that claimants choose to pursue claims under the Act rather than under the contract because they are confident of either securing a favourable determination from an adjudicator or at the very least securing a settlement in a very short time as some respondents prefer to settle rather than risk the prospect of a large determination against them.

A national system of SoP?

Members who operate nationally, naturally would prefer a consistent national system. However, they are sufficiently experienced with the challenges of the Australian federal system to realise this is unlikely to occur.

Adjudicators

Members expressed a very wide range of views about the quality of adjudicators: from 'very poor' to 'on the whole quite good'. No doubt this is a product of the very wide range of backgrounds, experience and skill sets of individual adjudicators, as well as the range of claims with which they deal.

Maximum or minimum claims

Some members saw value in imposing a cap on amounts that could be claimed, or a threshold amount below which the cost of administering the system exceeded the value of the claim. However, there was no agreement on what these amounts should be.

Authorised Nominating Authorities (ANA's)

Members have a perception, as a result of their experiences, that some ANA's (those that are commercial organisations, as distinct from those under the auspice of professional independent organisations) are claimant friendly. At least one ANA was criticised for providing assistance to prepare claims as well as nominating adjudicators.

Service of payment claims

Some members complained about the way in which payment claims were served, that they were sometimes served at places or on people which, although technically complying with service requirements under relevant laws, were not the usual manner of service of documents by the parties to the project, and that valuable time was often lost before the payment claims were discovered by relevant people within the respondent organisations. There was a perception amongst some members that this was often a deliberate tactic by claimants to gain an advantage under the Act. Some members would like to see the Act amended to allow parties to agree the manner of service of payment claims as the exclusive manner of service or see the service requirements under the Act tightened.

Submissions

The following submissions are based on the common themes emerging from the interviews with QMCA Members. Each submission is followed by suggested amendments to the Act.

1. Claims should be limited to progress payments

Limit the claims to progress claims, as the Act was intended, to ensure that progress payments are made to protect cash flow. Claims involving more than simply a claim for a progress payment should be excluded. This is particularly so where the claim may involve complicated contractual disputes that the adjudication process is not suited to dealing with.

Suggested amendment:

Amend the Schedule 2 definition of 'progress payment' to exclude:

- (a) disruption claims;
- (b) prolongation claims;

- (c) damages claims; and
- (d) claims related to changes in regulatory requirements.

2. Adjust the time periods

Whether a claim is for \$10,000 or \$10,000,000 the statutory time periods for preparation of a payment schedule, adjudication response and adjudicator's decision remain the same. This problem could be solved by introduction of a range of response times depending on the value of the claim.

Suggest amendments:

- (a) Different time periods for different amounts claimed.

| Claim value | Payment Schedule | Adjudication Response | Decision |
|---------------|------------------|-----------------------|------------------|
| <\$250k | 10 business days | 5 business days | 10 business days |
| \$250k - \$1M | 15 business days | 10 business days | 15 business days |
| >\$1M | 20 business days | 15 business days | 20 business days |

- (b) Adjusting 12 month period for claims.

It is very difficult for contractors to address claims 12 months after a subcontractor has left the site. Typically, by this time, the project is complete, the project team has disbursed, the job records have been archived and days pass (sometimes more than 10 business days) before the claim can be adequately dealt with.

Suggested amendments:

- (i) Reverse the operation of the time periods in section 17(4) by allowing a claim to be served on the earlier of the two periods¹.

Alternatively,

- (ii) Make it clear that the 12 month period in section 17(4)(b) runs from the time the claimant last carried out construction work or supplied related goods or services to which the claim relates, by saying:

'the period of 12 months after the claimant last carried out the construction work or supplied the related goods and services in respect of which the claim is made'.

Alternatively,

- (iii) Reduce the period from 12 months to 3 months.

¹ The period worked out under the construction contract or the period of 12 months after the construction work was last carried out or the related good and services to which the claim relates were supplied.

3. Insolvent claimants

The courts will not grant a stay of execution of a judgment based on an adjudication certificate unless a claimant is *clearly* insolvent. This means that a respondent's rights under section 100 are illusory in some cases, as there is no real prospect of recovering a payment made to the claimant where it disburses the money paid and has no other assets.

Suggested solution:

In the case of claimants who may not be able to repay sums payable to them under the Act, provision should be made to allow respondents to pay sums payable under the Act into a trust account (administered by the Adjudication Registry² or the Courts) pending the final determination of the dispute.

The authors recognise that there must be a balance between the rights of claimants to progress payments and the rights of respondents to recover such payments. It is suggested that an appropriate balance might be struck by allowing respondents to pay monies into the trust account where either the claimant is insolvent or where it can be shown that the claimant does not satisfy the financial requirements for licensing set by Queensland Building Services Board under the *Queensland Building Services Authority Act 1991*.

4. Balancing respondent's rights with claimant's rights

- (a) One of the underlying reasons for non-payment of progress claims is defective work. Some adjudicators make no allowance for defects in their determinations.

Suggested amendment:

Add section 26(2)(f):

'the estimated cost of rectifying any defects in the claimant's work'.

- (b) The parties should be able to agree on an ANA in the construction contract, just as they can agree a dispute resolution procedure. If no ANA is nominated in the contract there should be a neutral, not commercially motivated, authority dealing with the claims.

Suggested amendment:

Amend section 21(3)(b) as follows:

'must be made to the authorised nominating authority nominated in the construction contract, or if no authorised nominating authority is nominated in the construction contract, to the registrar who will select an authorised nominating authority³;

- (c) Resolve the competing lines of authority about the definition of 'reference date'. In *Reed v Martinek* [2009] QSC 345 it was held that the claim must be served 'on' the reference date. In *Tenix v Magaldi* [2010] QSC 7 it was held

² Interest from the funds could be used to fund the operation of the Adjudication Registry as the nominating authority – see 5

³ The registrar would develop a policy for how the applications were to be handled – hopefully using a 'cab rank' approach to evenly divide the work among ANAs

that the claim may be made at any time on or after the reference date. Uncertainty surrounding this issue needs to be resolved.

Suggested amendment:

Amend section 12 by adding the words '**On or**' at the commencement of the section.

- (d) Give prominence to the endorsement that the payment claim is made under the Act⁴. Currently, the endorsement can be made in any size font at any place in the payment claim. Given the very short time frame for responding to a payment claim and the severe consequences of failing to respond (summary judgment) this is unfair to respondents. Greater transparency is needed at to when a payment claim is being made under the Act.

It is suggested that a notice in a prescribed form, similar to the notice required under other Queensland legislation, be required to be attached to the first page of a payment claim which would clearly inform the respondent that a payment claim was being made and give notice of their rights and the consequences of failing to provide a payment schedule with the statutory time period.

Suggested amendment:

Amend s17(2)(c) by adding:

'must state that it is made under the Act in a notice in the prescribed form attached as the first page of the claim'

5. Neutral ANA's are preferable to commercial ANA's.

Participants perceived that some commercially operated ANA's were biased in favour of claimants and that their business interests aligned with favouring claimants.

This perception could be removed if the adjudication registry performed the tasks currently performed by the ANA's:

- (a) receiving adjudication applications;
- (b) assigning them to appropriately qualified⁵ and experienced adjudicators⁶;
- (c) training and support of adjudicators;
- (d) issuing adjudication certificates; and
- (e) publishing adjudicator's decisions.

Alternatively, guidelines for considering applications for registration of ANA's under section 45 or for renewal of registration of ANA's under Part 4, Division 4 of the Act should be reviewed to make it clear that ANA's should not provide assistance to claimants in preparing claims or if they perform that function they cannot act as an ANA.

⁴ Section 17(2)(c) of the Act provides that a payment claim must state that it is made under the Act.

⁵ QS for value disputes, engineers for engineering related claims, lawyers for contractual claims

⁶ The higher the value of the claim the more experienced the adjudicator needs to be.

Conclusion

QMCA Members were asked to rate their overall satisfaction with the Act out of 10 with a score of 10 being the most satisfied. The average score for satisfaction with the Act among the members who took part in the interviews was **5.7**. This indicates a reasonable level of satisfaction with the Act overall but also reflects that there are areas of the Act requiring consideration and reform.

It is clear from members' responses that there is room to improve the Act in the respects discussed above while remaining true to the Act's objectives. The QMCA would urge the Policy Sub-committee to consider the reforms recommended and to take appropriate steps to see that the recommended reforms are considered by the Queensland Building Services Board, the responsible Minister and other interested stakeholders within the Queensland Government.

Queensland Major Contractors Association
13 April 2010

Annexure 1

QMCA Members

1. Abigroup Contractors Pty Ltd
2. Boulderstone
3. BGC Contracting Pty Ltd
4. Bielby Hodings Pty Ltd
5. BMD Constructions Pty Ltd
6. Brookfield Multiplex
7. Clough Limited
8. Fulton Hogan Pty Ltd
9. Golding Contractors Pty Ltd
10. John Holland Pty Ltd
11. Laing O'Rourke
12. Leighton Contractors Pty Ltd
13. Macmahon Contractors Pty Ltd
14. McConnell Dowell Constructors (Aust) Pty Ltd
15. Monadelphous Engineering
16. Seymour Whyte Constructions Pty Ltd
17. Thiess Pty Ltd

Annexure 2

Questions asked to QMCA Members

1. How much experience have you had with the *Building and Construction Industry Payments Act 2004* (Qld)?
2. How many adjudications have you been involved in as a claimant/respondent?
3. Were all those adjudications in Queensland or in other jurisdictions as well?
4. What was the value of the claim in each case?
5. Was the dispute just about outstanding payment or were there underlying issues?
6. What were the results of the adjudications you were involved with?
7. What are the best features of the process?
8. What don't you like about the process?
9. What would you like to change about the process?
10. What would you like to keep the same about the process?
11. How should adjudicators be chosen - by claimants choosing the ANA, by the ANA named in the contract or by a central government agency?
12. Should there be a cap on the monetary value of claims that can be made?
13. Are the statutory time frames adequate? Should they be shorter, longer or flexible?
14. The object of the Act is to ensure that progress payments are made – but in achieving that object has the Act resulted in other adverse consequences?
15. Bearing in mind that adjudicators have a relatively short time to produce their decisions, what comments do you have on the general quality of the adjudication decisions?
16. Have any of your adjudications progressed to litigation? If so, what has been your experience?
17. Have you ever challenged the validity of an adjudication decision?
18. Would you be in favour of a national security of payment scheme?
19. Overall on a scale of 1 to 10 how satisfied are you with the legislation? (10 being the most satisfied).
20. Any other comments?