



Time limits under Building & Construction Industry Payments Act 2004

With the current Global Financial Crisis impacting on Australia's building and construction industry it seems that builders and contractors are responding to the downturn in the economy by moving away from the traditional litigation form of dispute resolution and favouring the use of the Building & Construction Industry Payments Act 2004 (**BCIPA**).

Adjudication Statistics

Adjudication applications have almost doubled this year recording 678 Adjudication applications lodged in March 2009 compared to 340 recorded in March 2008. With the rise in Adjudication applications it is important to be aware of the significant time limits placed on the procedural adjudication system.

Purpose of BCIPA

BCIPA was designed to provide a statutory based system of rapid adjudication for the quick resolution of payment disputes. The explanatory memorandum accompanying the *Building and Construction Industry Payments Bill* in 2004, considered the "domino effect" in the construction industry where the failure of one party to honour payment obligations can cause serious financial detriment on other parties in the contractual chain. Einstein J in *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, criticised the legislature as having effectively achieved a fast track interim progress payment adjudication vehicle. In *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903, the Court said that the whole rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard; hence time limits under the Act being strict, and the consequence of failure to comply with the stipulated time limits being significant.

Given the importance placed on the time limits for procedure to be followed under BCIPA it is crucial to understand such limitations and the consequences which result from their non compliance.

Payment Schedule

Section 18 of BCIPA allows for the respondent to either accept or dispute all or part of the payment claim. This is done by serving a payment schedule in response to the payment claim on the claimant. The payment schedule must be served within 10 business days after the payment claim is served. Failure of the respondent to serve a payment schedule within the prescribed time or pay the claim allows the claimant:

- to start proceedings to recover the unpaid claim as a debt. In such proceedings the respondent is barred from raising any counterclaim against the claimant or any defence in relation to matters arising under the construction contract;

- to make an adjudication application under section 21(1)(b) by notifying the respondent within 20 business days immediately following the due date for payment of its intentions to apply for adjudication of the payment claim (**the Notice**) and state in the notice that the respondent may serve a payment schedule on the claimant within 5 business days after receipt of the notice (Section 21(3)(c)(ii) and (iii) BCIPA).

Adjudication Application

Where a payment schedule is served the claimant can also make an adjudication application, however it must be lodged with a nominated authority and served on the respondent within 10 business days after receipt of the payment schedule (Section 21(3)(c)(i) BCIPA). An adjudication application must be in writing, identify the payment claim, the payment schedule to which it relates and may contain submissions relevant to the application (Section 21(3) BCIPA).

Adjudication Response

Section 24 of BCIPA requires a respondent to give the adjudicator a response to the claimant's adjudication application at any time within the later of the following to end-

- 5 business days after receiving a copy of the application;
- 2 business days after receiving notice of an adjudicator's acceptance of the application.

An adjudication response must be in writing and it may contain submissions however such submissions are limited to the reasons for withholding payment as stated in the payment schedule (Section 24(4) BCIPA).

Section 25 of BCIPA provides that the adjudicator must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response. Further, an adjudicator may not consider a response not served within time and must decide the adjudication within 10 business days after the earlier of-

- the day on which the adjudicator receives the adjudication response;
- the day on which the adjudicator should have received the adjudication response.

Where the respondent fails to provide an adjudication response the adjudicator will make a determination taking into account the statutory provisions, the contract, the payment claim, the payment schedule and the adjudication application together with the relevant submissions and documentation. The failure of the respondent to put relevant materials before an adjudicator does not automatically give rise to any obligation to pay the amount claimed, as an adjudicator must be satisfied that the claimant has a prima facie entitlement to the amount claimed even if the respondent has failed to put materials forward to challenge it (*Coordinated Constructions Co v JM Hargreaves* [2005] NSWCA 228 at 52). However, the comments by McDougall J in *Kembla Coal & Coke v Select Civil* [2004] NSWSC 628 give some understanding on the importance of submitting a payment schedule or an adjudication response:

The respondent, should it wish to dispute the claim, must provide a payment schedule. If the matter goes to adjudication and the respondent still wishes to oppose the claim, it must provide an adjudication response. If the relevant disentitling circumstance is not alleged in the payment schedule or in the adjudication response, then the likely, and perhaps inevitable, consequence is that the adjudicator will determine the claimant's

entitlement without regard to that circumstance. Indeed, I think [s 25(2) of BCIPA] effectively recognises that this may be so.

Conclusion

The reality is that by excluding 'resident owners' from the scope of BCIPA (See section 3(2)(b) and 3(5) BCIPA) the fast track system is generally restricted to commercial contracts or commercial parties, under which such parties might be expected to have at least working knowledge of BCIPA and the obligations that it imposes. Whilst the system allows for a quick resolution with a decision in as little as seven weeks, when compared to an action in Court which could take approximately 12 to 18 months, the time limits are strict and careful compliance is necessary in order that your response is given the proper consideration it deserves by an adjudicator.

Paul Rojas

Associate

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Telephone (07) 3009 8444 Fax (07) 3009 8499

e: mail@rostroncarlyle.com website : <http://www.rostroncarlyle.com>