



## NEWS

### Building and Construction Industry Payments Act 2004

28 June 2004

On 11 May 2004 State Parliament passed the *Building and Construction Industry Payments Act 2004* marking a watershed day for the Queensland building and construction industry.

Improving payment outcomes for all parties operating in the industry has been an issue for many decades, particularly in relation to subcontractors.

While bad debts are not unique to the building and construction industry, the industry is particularly vulnerable to payment problems as it generally operates under a hierarchical chain of contracts.

The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow and, in some cases, insolvency.

A familiar story to many in the industry is where a claim for payment by a subcontractor or supplier is disputed by the superior contractor resulting in payments being held up for lengthy periods while the dispute is being resolved.

There has been potential in the industry for these payments to be withheld unfairly to the disadvantage of the claimant.

The Act, builds upon the previous reforms by establishing, in relation to construction contracts, a statutory based system of rapid adjudication for the quick resolution of payment disputes on an interim basis by an appropriately qualified and independent adjudicator.

Rapid adjudication allows for payments to flow quickly down the contractual chain.

However, rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final determination of a payment dispute by a court or tribunal of competent jurisdiction.

The significance of an adjudicator's decision is that pending final determination of the payment dispute the party with the most commendable case, as determined by the adjudicator, retains the monies in dispute.

This represents a significant shift from the current system where responsibility for enforcing payment has ordinarily been left to the contracted party who has performed the construction work or supplied the related goods or services for the benefit of the contracting party.

Decisions by an adjudicator are enforceable as a judgment debt if a contracting party fails to pay moneys to a contracted party as determined by the adjudicator, therefore money must change hands in accordance with the adjudicator's decision.

For BSA licensees attracting a judgment debt is penalized by the issuing of ten demerit points against the licence. Obtaining 30 demerit points in a three year period will result in a three year licence disqualification. For non licensees receiving a judgment debt can trigger a winding up order or bankruptcy proceedings against the relevant company or individual, through a court of relevant jurisdiction.

The application of the Act covers all forms of construction contracts other than contracts involving resident owners under the *Domestic Building Contracts Act 2000*. Significantly the "state" is captured in the same manner as private parties.

The rapid adjudication process cannot be used by builders undertaking domestic building work with the "mum and dad" owner however, these disputes can be taken to the Commercial and Consumer Tribunal for a decision with expedited hearing processes.

The Act will cover owner builders who engage contractors and trades people in a building contractor role. The process can also be utilised by engineers, architects, electricians and the suppliers of goods and services.

The Act does not in any way affect the operations of the *Subcontractors' Charges Act 1974*. Subcontractors may continue to utilise this as they have always done. However, a subcontractor will not be permitted to start, continue or enforce adjudication once they lodge a notice of charge under the *Subcontractors' Charges Act 1974*. In other words subcontractors will not be able to have both of these legislative options operating at the same time.

Subcontractors will be required to choose which method they wish to utilise to obtain payment for construction work done. However, there will be nothing to stop subcontractors switching from one method to the other if they believe that due to changing circumstances the alternative option will result in a better payment outcome.

A default provision exists in the Act for when parties have not, included in their contract, the intervals for making progress claims, times for making payment and how such payments are to be valued.

In the absence of a contractual provision the Act provides payment claims must be made at monthly intervals with payment becoming due 10 business days after the payment claim is made.

If the construction contract is silent on how a payment is to be valued, the Act provides for calculation of the amount on the basis of the value of work carried out, including related goods and services provided.

Independent adjudicator's with relevant expertise who are registered to hear disputes will be contracted by an authorised nominating authority (ANA). Persons with payment disputes will access an adjudicator via one of these independent bodies who will be listed on the website. As in other states it is proposed private adjudicators conduct the adjudication on a user-pays basis.

An adjudicator must make a decision on the dispute within 10 business days from either receiving the respondent's adjudication response or the expiry of the specified time frame for receiving an adjudication response.

The adjudicator has the power to call for further submissions, hold a conference and view the relevant construction site. An adjudicator must provide to both parties reasons for a decision, including the adjudicated amount and the payment date.

If payment of the adjudicated amount is not made, the claimant can request an adjudication certificate, which can then be lodged in a court of competent jurisdiction as a judgment debt.

The important benefits of the rapid adjudication process are it allows for a prompt interim decision on disputed payments, encourages communication between the parties about disputed matters and provides parties with a much faster and cheaper alternative to resolve the dispute without entering the court system.

The adjudication process also allows unpaid parties to suspend work or the supply of goods until payment of the adjudicated amount is received.

The Act also amends part 4A of the *Queensland Building Services Authority Act 1991* to align contractual requirements with the rapid adjudication process. There is no doubt this Act is groundbreaking and will have a positive impact on payment relationships between parties involved in the performance of construction work in Queensland.

The legislation is set for review after it has been in effect for 12 months.

For further information or to register to attend a road show, refer to [www.bcipa.qld.gov.au](http://www.bcipa.qld.gov.au).