

Domestic Adjudication: The Way Forward?

Introduction

1. This paper examines some mooted amendments to the *Building and Construction Industry Payments Act 2004* ("the BCIPA") in particular, it will examine the benefits and disadvantages and shortcomings of some proposals which may ultimately incorporate the adjudication of disputes arising under a *domestic building contract* involving *domestic building work* as those terms are relevantly defined in ss. 7 and 8 of the *Domestic Building Contracts Act 2000* ("the DBCA").
2. At the outset, it should be noted that the views expressed herein are the views of the writer and ought not be misconstrued as being the views of the Building and Construction Industry Payments Agency, its Registrar, the Queensland Building Services Authority or the Queensland State Government.
3. The writer welcomes any written feedback on the contents of this paper which may act as part of the consultation process in formulating advice to the Registrar on the proposed amendments.

"Security of Payment Legislation" Background

4. There is in Queensland, as with other Australian States and Territories, a long history of failed building companies resulting in economic hardship for affected subcontractors, material suppliers and building consultants. There have been previous legislative attempts in Queensland to limit the financial exposure of subcontractors through the introduction of the *Subcontractors Charges Act 1974* ("the SCA"). Essentially, the SCA entitles a subcontractor to secure the payment of monies by placing the onus on the principal to retain money payable to the contractor until the Court in which the claim is heard directs to whom and in what manner the same is to be paid.¹ It is fair to say that the SCA has had limited success in providing subcontractors with successful outcomes. It has been variously described by judicial officers as "obscure"², "notoriously difficult to construe"³, "universal[ly] ... uncertain"⁴, and "difficult to follow and apply"⁵. The SCA continues in

¹ The Minister for Justice and Attorney-General, the Hon WE Knox, Qld Parliamentary Debates, *Hansard*, (April 1974, p. 3701)

² *Rees v Mt Isa City Council* [1979] Qd R 553 per Mathews at p. 556

³ *Ibid* at p.599 per Connolly J

⁴ *Ex parte Pavex Constructions & Ors* [1979] Qd R 318 per Dunn J at p.334

⁵ *Re Castley* (unrep, QSC 18 September 1980) per Lucas SPJ

operation today and interestingly overrides the operation of the BCIPA⁶, although the anecdotal evidence available to the writer is that since the introduction of the operational provisions of the BCIPA on 1 October 2004, the SCA has received limited use by the industry.

5. The BCIPA substantially mirrors the provisions of the New South Wales equivalent, the *Building and Construction Industry Security of Payment Act 1999 (NSW)*. Other Australian States which have some form of what is loosely referred to as “Security of Payment Legislation” are:
 - Victoria⁷;
 - Western Australia⁸; and
 - The Northern Territory⁹.
6. The writer understands that South Australia¹⁰, Tasmania and the Australian Capital Territory are in various advanced stages of preparation of Bills of Parliament and intend for their respective Security of Payment Legislation to be enacted by the end of 2009/beginning of 2010. It is noteworthy that the Tasmanian Department of Justice on 19 August 2009 released for public comment, its draft *Building and Construction Industry Security of Payment Bill 2009 (TAS)*. In the Tasmanian draft Bill, there are no exclusionary provisions for resident owners, meaning, assuming the draft is not amended, domestic adjudication will be permissible in that state.
7. The various forms of the Security of Payment Legislation have their genesis in the *Housing Grants, Construction and Regeneration Act 1996 (UK)*.

The Operation of the BCIPA

8. Pursuant to s.7, the object of the BCIPA is:

“... to ensure that a person is entitled to receive, and is able to recover, progress payments if the person –

 - (a) Undertakes to carry out construction work under a construction contract; or
 - (b) Undertakes to supply related goods and services under a construction contract.”
9. In simple terms, the Act operates in the following way:
 - (i) An individual or a corporation who has performed *construction work* or supplied *related goods and services* as those terms are defined in ss.10 and 11 of the BCIPA (“the claimant”) may serve on the person for whom the construction work or related goods and services was performed or supplied (“the respondent”) a “payment claim” pursuant to s.17 of the Act.
 - (ii) The definition of “*construction work*” is extremely wide and incorporates a great variety of work ranging from the “*construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of building and structures, whether permanent or not,*

⁶ See s. 4 of the BCIPA

⁷ *Building and Construction Industry Security of Payment Act 2002 (VIC)*

⁸ *Construction Contracts Act 2004 (WA)*

⁹ *Construction Contracts (Security of Payment) Act 2004 (NT)*

¹⁰ *Building and Construction Industry Security of Payment Bill 2007 (SA)*

forming or to form part of land” to earthworks to painting and decorating and any other work prescribed under a regulation.

- (iii) The definition of “*related goods and services*” is equally wide. “*Goods*” includes “*materials and components to form part of any building, structure or work arising from construction work*”. It includes plant or materials. “*Services*” includes the provision of labour to carry out construction work and associated services such as architectural, design, surveying, engineering, landscaping and soil testing.
- (iv) A respondent served with a payment claim, may reply by serving a “payment schedule” which must, pursuant to s.18:
- a. Identify the payment claim;
 - b. State the amount it intends to pay the claimant; and
 - c. If the scheduled amount is less than the claimed amount, state its reasons for the lesser amount.
- (v) The payment schedule must be served on the claimant within the earlier of:
- a. The time required under the contract; or
 - b. 10 business days after the payment claim is served.
- (vi) Pursuant to s.21(1) of the BCIPA, the claimant may apply for adjudication of the payment claim, if:
- a. The respondent served a payment schedule under Division 1:
 - i. But the scheduled amount is less than the claimed amount; or
 - ii. The respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment.
 - b. The respondent fails to serve a payment schedule on the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment.
- (vii) In the event that the respondent fails to serve a payment schedule under Division 1 of the BCIPA and fails to pay the whole or any part of the claimed amount by the due date for payment, the respondent becomes liable to pay the claimed amount pursuant to s.18(5) of the BCIPA, in which case, the claimant may:
- a. Bring an application to a Court of competent jurisdiction to recover the unpaid portion of the claimed amount as a debt due and owing¹¹; or
 - b. Make an application for adjudication, but it must first provide the respondent with a “second chance” to provide a payment schedule within 5 business days of receiving the claimant’s notice pursuant to s.21(2) of the Act. The application for adjudication must be made within 10 business days after the end of the 5 business day period; and
 - c. Serve a notice of intention to suspend the works.
- (viii) In the event that the respondent does provide a payment schedule within the earlier time of that stated in the contract or 10 business days after receiving the payment claim, and the respondent fails to pay the whole or part of the scheduled amount on or before the due date for payment, the claimant may:

¹¹ See s.19 of the BCIPA

- a. Bring an application to a Court of competent jurisdiction to recover the unpaid portion of the scheduled amount as a debt due and owing¹²; or
 - b. Make an application for adjudication, pursuant to s.21(1)(a)(ii) of the Act. The application for adjudication must be made within 20 business days after the due date for payment; and
 - c. Serve a notice of intention to suspend the works.
- (ix) If the Claimant makes an adjudication application (“the application”) to an Authorised Nominating Authority (“ANA”), the ANA must appoint a registered adjudicator and the adjudicator must inform the parties of his or her acceptance within 4 business days of the making of the application, otherwise, a claimant may withdraw the application and refer it to another ANA.¹³
- (x) The claimant must serve the application on the respondent.¹⁴
- (xi) The respondent may provide the adjudicator with an adjudication response within 5 business days after receiving the application, or within 2 business days after receiving notification of acceptance of the application by the adjudicator, whichever is the latter.¹⁵
- (xii) However, the respondent may only provide an adjudication response to the adjudicator if it has served a payment schedule on the claimant within 10 business days after receiving the payment claim, or within 5 business days after receiving the claimant’s “second chance” notification of an intention to apply for adjudication.¹⁶
- (xiii) An adjudicator¹⁷:
- a. Must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response to the adjudicator;
 - b. Must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator;
 - c. Must decide an adjudication application as quickly as possible, and in any case:
 - i. Within 10 business days after the earlier of the date on which the adjudicator receives the adjudication response, or the date on which he or she should have received the adjudication response; or
 - ii. Within such time as the parties may agree.
 - d. In most cases decides the issues in dispute “on the papers” but has authority to¹⁸:
 - i. Request further submissions and set deadlines in relation thereto;
 - ii. Call a conference of the parties, wherein they shall have no entitlement to be legally represented;
 - iii. Carry out an inspection of any matter to which the claim relates.
 - e. When making his or her decision may only consider the following¹⁹:

¹² See s.20 of the BCIPA

¹³ See s.32(1) of the BCIPA

¹⁴ See s.21(5) of the BCIPA

¹⁵ See s.24(1) of the BCIPA

¹⁶ See s.24(3) of the BCIPA

¹⁷ See s.25(3) of the BCIPA

¹⁸ See s.25(4) of the BCIPA

¹⁹ See s.26(2) of the BCIPA

- i. The provisions of the BCIPA, and where relevant Part 4A of the QBSA Act;
 - ii. The provisions of the construction contract;
 - iii. The payment claim and all properly made submissions;
 - iv. The payment schedule and all properly made submissions;
 - v. The results of any inspection carried out by the adjudicator.
- f. Must decide²⁰:
- i. The amount of the progress claim, if any, to be paid by the respondent;
 - ii. The date on which the amount became or becomes payable; and
 - iii. The rate of interest payable on any amount.
- g. Must publish his or decision in writing and must include his or her reasons for the decision, unless the parties agree otherwise²¹.
- h. May decide which party pays the costs of the adjudication, but this is limited to the costs of the adjudicator and the ANA's costs. The adjudicator may not award the costs of preparing or defending the application.²²
- (xiv) The respondent must pay the adjudicated amount to the claimant on or before 5 business days after the date on which the adjudicator's decision is served on the respondent, or a later date if decided by the adjudicator.²³
- (xv) In the event that the respondent fails to pay the adjudicated amount within the required time, the claimant may make application to the ANA for an "adjudication certificate" which may be filed as a judgment for a debt in a Court of competent jurisdiction.²⁴

Current Relevant Limitations of the BCIPA

10. Importantly for the purposes of this paper, pursuant to s.3(2)(b), the BCIPA does not apply to a "*construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside.*" Pursuant to s.3(5) of the BCIPA, the term "resident owner" is defined in Schedule 2 of the DBCA as:

"a building owner who:

- (a) *Is an individual; and*
- (b) *Intends to reside in the building-*
 - (i) *On completion of the domestic building work; or*
 - (ii) *Within 6 months after the completion of the work."*

11. The "resident owner" exception does not apply if the person is an owner-builder or should be an owner-builder pursuant to ss.43D and 43E of the QBSA Act. Nor does it apply if the person is a "building contractor" as that term is defined in Schedule 2 of the QBSA Act.

12. Another very important consideration for the purposes of this paper is that, unlike the UK and West Australian Acts, the BCIPA only serves to assist parties making a claim against a

²⁰ See s.26(1) of the BCIPA

²¹ See s.26(3) of the BCIPA

²² See ss. 34 and 35 of the BCIPA

²³ See s.29 of the BCIPA

²⁴ See s.31 of the BCIPA

party “above” them in the contractual chain. That is, the BCIPA does not permit a claim to be brought by a principal against a subcontractor.

13. Since the commencement of the Act on 1 October 2004 to June 2009, the BCIPA has facilitated the making of 2,324 adjudication applications²⁵ with an approximate total claimed amount of \$600,000,000.00. It is unclear how many Originating Applications have been made in the Courts pursuant to ss.19 and 20 of the BCIPA as those statistics are not readily available.
14. In the past 12 months alone, Registry statistics reveal that the number of adjudication applications has almost doubled from 529 to year ending June 2008 to 999 to year ending June 2009.
15. The success of the BCIPA as judged against other state equivalents is best illustrated by the following table.

	New South Wales (amended Act commenced March 2003- calendar years 2003-2008)	Queensland (commenced October 2004, financial years up to 30.06.09)	Victoria (commenced 2002- calendar years 2002 – 2008)	Western Australia (commenced 2005, financial years up to 1 Jan 2009)
Application Lodged	4938	2324	168	182
Total Claim Value (rounded up)	\$2.3 billion	\$600 million	\$112 million	\$176 million

16. The uptake of the BCIPA has been significantly assisted by the fact that the Registry is appointed by the Queensland Building Services Authority (“the Authority”) which regulates approximately 80,000 building contractors in Queensland. No other state or territory has a comparable administrative mechanism which can reach and influence building contractors industry-wide.
17. Notwithstanding the success of the BCIPA thus far, it is acknowledged that the legislation can be improved to provide equally efficient dispute resolution processes in the domestic building sector as it has done in the commercial and civil sectors.
18. It is noteworthy that in the financial year ending 30 June 2009, in selected parts of South East Queensland alone²⁶, the total number of completed building contracts were:

	Number of Projects	Value of Projects
Total Domestic Building Projects	17,744	\$3,578,783,343.00
Total Non-Domestic	2,354	\$3,836,193,462.00

²⁵ Figures provided by the Registry

²⁶ Figures provided by the Queensland Master Builders Association taken from the Australian Bureau of Statistics. Local areas of South East Queensland included in the figures are:

- Brisbane, Caboolture, Ipswich, Logan City, Pine Rivers, Redcliffe, Redland City and Somerset

Building Projects		
Total Building Projects	20,098	\$7,414,976,805.00

19. The above figures demonstrate that whilst the value of the domestic building sector compared with the non-domestic building sector in the researched areas is very similar, the domestic building sector represents a seven-fold number of projects than those constructed in the non-domestic sector. It is likely therefore, that with the significantly greater number of domestic building projects, there is likely to be a greater number of building disputes in the domestic building sector.
20. To speak of the non-applicability of the BCIPA in the domestic building sector is however, not accurate. The BCIPA does apply to the domestic building sector, but **NOT** where one party is a resident owner as detailed above. For instance, a subcontract plumber who has performed plumbing work on a dwelling can take advantage of the provisions of the BCIPA against the contracting builder of that dwelling, but that same builder may not take advantage of the legislation against the owner, if he and/or she is a “resident owner”. Likewise, the plumber cannot take advantage of the provision of the legislation against the resident-owner if for instance the plumber was engaged directly by the resident owner to perform maintenance work for example.

Domestic Adjudication

21. Amending the BCIPA to include for want of a better term “domestic adjudication” would facilitate the resolution of a number of challenges being faced by industry stakeholders and the public at large.
22. Currently, when a dispute arises between a resident owner and a building contractor, the parties’ options are:
- Self-help remedies ranging between negotiation to suspension of works and/or site “lock outs”;
 - Termination of the building contract and the commencement of legal proceedings;
 - Some form of alternative dispute resolution such as mediation through an Industry Association for example.
23. Until March 2007, the Commercial and Consumer Tribunal had a form of exclusive jurisdiction in relation to domestic building disputes in Queensland by virtue of s.40 of the *Commercial and Consumer Tribunal Act 2003*. This provision has since been amended so that proceedings can be commenced and remain in Courts of competent jurisdiction. There have in the past been long delays in having disputes heard in the Commercial and Consumer Tribunal. Delays of between 12 months and three years are not uncommon.
24. In July 2009, the Registry undertook an informal study of 52 domestic building disputes that were decided in the Commercial and Consumer Tribunal between 3 November 2008 and 7 July 2009. The study reveals that:
- (i) The mean number of days between the filing of an Application in the Tribunal and when the Tribunal’s decision was made was 430 days;

- (ii) The mean number of days between the date the contract was entered into and when the Tribunal's decision was made was 890 days.

25. Despite its objectives of providing *inter alia* "just, fair, informal, cost efficient and speedy"²⁷ outcomes, litigation in the Commercial and Consumer Tribunal can not only be a long and drawn out process, but very expensive for litigants who are represented by legal practitioners and for those relying on the evidence of experts. These difficulties lead to increased litigation costs, general dissatisfaction with the legal process and ultimately increased building costs. To be fair however, the Commercial and Consumer Tribunal operates in a very difficult environment and to its credit runs an effective alternative dispute resolution program. In the 08/09 fiscal year, of the 651 domestic and commercial building disputes that came before the CCT, 293 were settled in directed mediation and 154 were either settled or withdrawn.²⁸
26. On 1 December 2009, the Commercial and Consumer Tribunal will cease to operate and will be subsumed into the new "super tribunal" the Queensland Civil and Administrative Tribunal ("QCAT"). Whilst QCAT appears as though it will commendably have a strong emphasis on alternative dispute resolution at "the front end" as did the CCT, it is submitted that given the often complex and expert reliant nature of building disputes, a final hearing and determination of the parties rights and obligations is likely to continue to lead to long delays and costly outcomes for litigants.
27. The difficulties which await the swift administration of justice in QCAT are very likely to be the same problems which confronted the CCT. It is submitted that many domestic building disputes will still need to come before QCAT for final determination for reasons which include:
- (i) The Authority does not intervene in domestic building disputes between building contractors and home owners when domestic building contracts remain on foot.
- (ii) Home owners and contractors alike are routinely advised by the Authority that it does not involve itself in disputes of a contractual nature. Therefore in instances where construction work is underway, a disaffected homeowner must either allow the contractor to continue the domestic building work and then upon completion of the contract, make a complaint to the Authority, or it must validly terminate the contract in order for a home owner to be able to take advantage of the Statutory Insurance Scheme in cases of non-completion of the works²⁹ and defective workmanship³⁰.
- (iii) The difficulty with either of those propositions is that the contractor may only be compounding the defects if left unchecked and in the latter case, from past experience, a declaration that a domestic building contract was validly terminated may take several years whilst unfinished homes are left to decay. If the homeowner commences rectification work in the interim without the express approval of the Authority (which is

²⁷ See s.4 of the Commercial and Consumer Tribunal Act 2003 ("the CCT Act")

²⁸ Commercial and Consumer Tribunal Annual Report 08/09, p.21 – see http://www.tribunals.qld.gov.au/Registry/2007_08%20Tribunal%20Annual%20Report.pdf

²⁹ BSA Insurance Policy clause 1.2 – Editions 7 and 8

³⁰ BSA Insurance Policy clause 4.3(c) – Editions 7 and 8

oftentimes not given), then such actions are likely to void the Statutory Insurance Scheme³¹.

28. The second challenge with the status quo is that, as discussed above, domestic building contractors do not have the ability to take advantage of the BCIPA when contracting with resident owners. This leads to the anomalous situation where the principal contractor for domestic building work can have the Act used against it by its subcontractors and suppliers but cannot use the BCIPA as a means of securing its payments against the resident owner.
29. This also creates an anomalous situation where a contractor who has entered into a commercial building contract with a principal for the sum of \$1,000.00 can utilise the BCIPA against the principal, but a domestic building contractor who enters into a domestic building contract with a resident owner for the construction of a \$2,000,000.00 home cannot.
30. It is recognised that resident owners are deserving of greater protection than are parties to a commercial building contract. Government has an obligation to ensure that “Mums and Dads” are not unfairly disadvantaged by the operation of an amended BCIPA which may introduce the concept of domestic adjudication. With adequate checks and balances, it is submitted that the rights of resident owners can be fairly balanced against the rights of domestic building contractors to be paid their lawful contractual entitlements.

Effect of Proposed Amendments

31. Although the finer details of the legislative mechanics of domestic adjudication is beyond the scope of this paper, it is submitted that domestic adjudication would have many of the characteristics of the current system but with various amendments, including:

Safeguards

- a. In order for a domestic building contractor to take advantage of domestic adjudication against a resident owner, one suggested safeguard would be to require the domestic building contractor to have provided the resident owner with a prescribed explanation of the process of domestic adjudication at the time of providing the “Contract Information Statement”, that is before the contract is entered into. The Contract Information Statement must contain information as approved by the Authority pursuant to s.99 of the DBCA. It must contain advice that the domestic building contract is subject to the operation of the relevant amended part of BCIPA.
- b. A further suggested model would see both the domestic building contractor AND the resident owner being able to utilise the operation of domestic adjudication. That is, the resident owner, unlike the current regime, could use the operation of BCIPA “down” the contractual chain. It is thought that this may be a more palatable option for the Legislature when considering whether to open up the scheme to “Mums and Dads”. In practice however, the utility of such an option is questionable, apart from the “feel good factor”. In reality, resident-owners are unlikely to gain any significant benefits from being able to make a claim or counterclaim against the domestic building contractor, given that a respondent to an adjudication application can

³¹ BSA Insurance Policy clause 5.1 – Edition 7; clause 7.1 – Edition 8

already claim as a set-off the estimated costs of rectifying defects³² and other claims such as liquidated damages.

Domestic Payment Claim – s.17

- c. A further layer of protection could be introduced at the time the domestic building contractor serves a “domestic payment claim” on the resident owner. The domestic building contractor should have to provide a “Warning Statement” which would form the front page of the domestic payment claim, similar to the PAMD Form 30c Warning Statement used to warn buyers of residential real estate pursuant to s.366D of the *Property Agents and Motor Dealers Act 2000* about:
- (i) The buyer’s rights to exercise a “cooling off period”;
 - (ii) A recommendation to obtain independent legal advice;
 - (iii) A recommendation to obtain independent valuation advice.
- d. If it was deemed desirable to allow a claimant resident owner to be able to claim against a respondent domestic building contractor, the resident owner would not be required to provide a “Warning Statement” when serving a domestic payment claim, but would otherwise have to comply with similar provisions contained within s.17(2), namely that the domestic payment claim:
- (i) Must identify the construction work or related goods and services to which the claim relates; and
 - (ii) Must state the amount of the progress payment or “*other claim*” that the claimant purports to be payable (“the claimed amount”); and
 - (iii) Must state that the claim is a “domestic payment claim” made under the BCIPA.
- e. A domestic payment claim served by the domestic building contractor on a resident owner would be rendered invalid if:
- (i) The Contract Information Statement did not contain details of the process of domestic adjudication as approved by the Authority;
 - (ii) It does not include as its front page, the prescribed “Warning Statement” the wording of which would be regulated by the Authority;
 - (iii) The domestic building contract, or the manner in which the domestic building contract is being managed by the domestic building contractor, does not comply with the DBCA. For example, a domestic payment claim made pursuant to a contract for domestic building work which was not in writing would be invalid.³³ This is a departure from the present regime which permits claims to be made under oral construction contracts.³⁴ Similarly, a domestic payment claim which claimed monies for domestic building work the subject

³² S.14(1)(b)(iv)

³³ See s.26 of the DBCA

³⁴ See s.3(1)(a) of the BCIPA

of an unwritten and unsigned variation would also be invalid³⁵ to the extent of the claim which was not authorized by the resident owner in writing.

Domestic Payment Schedule – s.18

- f. It is envisaged that the provisions relating to a valid domestic payment schedule would substantially mirror those contained within the existing s.18 of the BCIPA but with important amendments including:
- (i) The party receiving the valid domestic payment claim (“the respondent”), whether they be a resident owner or domestic building contractor would have 15 business days after receiving a valid domestic payment claim to provide a “domestic payment schedule” (compared to 10 business days under the existing regime);
 - (ii) Unlike the existing regime, apart from merely raising reasons to support non-payment of the claimed amount, the respondent may raise a counterclaim against the claimant. That is, the domestic adjudication process could be used by both the claimant and the respondent, one against the other.
 - (iii) The counterclaim could claim damages arising from a breach of contract. For example, a respondent resident owner could seek liquidated damages for delays in reaching practical completion by the due date for practical completion, or damages for the rectification of defective building work. A respondent domestic building contractor could for example, claim damages for prolongation costs arising out of delays attributable to the claimant resident owner.

“Second Chance” Domestic Payment Schedule – s.21(2)

- g. Where either the respondent domestic building contractor or the respondent resident owner fail to provide a timely domestic payment schedule in the first instance (“the Division 1 domestic payment schedule”), it is envisaged that the claimant would have to provide the respondent with a Notice advising them of their intention to apply for adjudication of the domestic payment claim and that they have 10 business days after receiving the Notice to provide a valid domestic payment schedule (“the Division 2 domestic payment schedule”).
- h. In the event that either party in their capacity as respondent fails to serve a valid Division 1 or Division 2 domestic payment schedule, or fails to pay the whole or part of the scheduled amount by the due date for payment, the claimant shall **NOT** have the entitlement to bring an application to the Court for judgment on the claimed amount, or scheduled amount as the case may be, as a debt.³⁶ That is, all disputes under the guise of the BCIPA must be referred to domestic adjudication for determination.

³⁵ See s.79 of the DBCA

³⁶ *cf* s.s.19 and 20 of the BCIPA

Domestic Adjudication Application – s.21

- i. It is envisaged that a claimant building contractor or a claimant resident owner would have equally identical time frames to commence a domestic adjudication application, with an additional 5 business days added to the timeframes of the existing regime. A separate shorter timeframe was considered for claimant domestic building contractors, but this was considered to unduly complicate the issue. In the premises, it is envisaged that a domestic adjudication must be made:
 - (i) Within 15 business days after receiving a valid Division 1 domestic payment schedule that provides a scheduled amount lesser than the claimed amount;
 - (ii) Within 25 business days after the due date for payment where the respondent fails to pay the whole or any part of the scheduled amount by the due date for payment;
 - (iii) Within 15 business days after receiving the Division 2 domestic payment schedule or when it should have received the Division 2 domestic payment schedule.

Respondent may convert to Claimant

- j. In addition to either party's statutory entitlement to serve a domestic payment claim on the other, in the event that a party who served a valid domestic payment claim fails to make an application for adjudication within the prescribed times detailed above, and the party who received the valid domestic payment claim raised a counterclaim against the serving party (although the non-service of a counterclaim in the payment schedule would not be fatal), the counterclaiming party may serve on the other a fresh domestic payment claim and the process starts anew with the previous respondent now becoming the claimant and vice versa. In which case the original respondent is provided with the opportunity to have their dispute adjudicated as a result of the original claimant failing to make a timely domestic adjudication application.
- k. It is envisaged that domestic adjudication applications will be made to the current panel of Authorised Nominating Authorities who would then nominate and receive an acceptance from an appropriately qualified and registered domestic building work adjudicator ("the Adjudicator") within 4 business days after receiving the application.

Claimant May Make a New Application in Certain Circumstances – s.32

- l. In the event that the time restrictions contained in paragraph 30k are not met, or if the Adjudicator does not decide the matter by the prescribed or agreed time, the claimant may withdraw the domestic adjudication application and re-lodge it with the same or another ANA within 5 business days after the claimant becomes entitled to withdraw the previous domestic adjudication application.

ANA to Serve the Domestic Adjudication Application on the Respondent

- m. There has been some debate on whether or not the ANA ought to serve the domestic adjudication application on the respondent. In the writer's view, this task ought not be performed by the ANA, but should more properly be performed by the claimant for the following reasons:
- (i) ANA's ought to remain neutral and take no active role in the domestic adjudication process other than the administration of the appointment of the Adjudicator, to act as a conduit for communications between the Adjudicator and the parties and to issue adjudication certificates as and when required;
 - (ii) The claimant ought to serve the domestic adjudication application on the respondent, just as a plaintiff in civil proceedings serves a defendant with a Claim and Statement of Claim. The Courts do not serve pleadings on one party at the request of another.
 - (iii) ANA's may be reticent to become involved in the service of documents from a cost perspective. Whilst many domestic adjudication applications may involve small quantities of material, it would be unfair to ask ANA's to bear the costs of serving those documents, particularly if the materials are voluminous.

Adjudication Responses – s.24

- n. Whether the respondent is a resident owner or a domestic building contractor, it may give the adjudicator a response to the domestic adjudication application (“the domestic adjudication response”) at any time within the later of the following to end:
- (i) 10 business days after receiving a copy of the domestic adjudication application;
 - (ii) 7 business days after receiving notice of an adjudicator's acceptance of the domestic adjudication application.
- o. Identical rules would apply under domestic adjudication regarding a respondent's entitlement to make a domestic adjudication response as are contained in the current regime, namely:
- (i) The respondent may give the domestic adjudication response to the adjudicator only if the respondent has served a domestic payment schedule on the claimant within the prescribed time;
 - (ii) The respondent cannot include in the domestic adjudication response any reasons for withholding payment unless those reasons have already been included in the domestic payment schedule.
 - (iii) The respondent must serve a copy of the adjudication response on the Claimant.

Adjudication Procedures – s.25

- p. It is envisaged that an Adjudicator would adopt similar, but not identical procedures to his or her commercial counterparts as currently detailed in s.25 of the BCIPA.
- q. It is envisaged that an adjudicator under the domestic adjudication regime is likely to have a greater “hands on” approach than his or her commercial counterparts. Whilst s.25(4)(c) and (d) of the existing regime currently permit an Adjudicator to call a conference of the parties or to conduct an inspection of the works, in the writer’s experience, this is very rarely done. It is envisaged that a domestic adjudicator may consider it more desirable for fast and cost efficient outcomes, to take part in site inspections and conferences with the parties.

Adjudicator’s Decision – s.26

- r. The domestic adjudication regime will require equivalent provisions to those contained in s.26 of the BCIPA but will need to reflect the fact that an Adjudicator may not necessarily be making a decision about the valuation of the progress claim. That is, he or she may decide for example that the claimant domestic building contractor is entitled to nil monies and that the respondent resident owner is entitled to liquidated damages.

Due date for payment and interest – s.15

- s. In relation to calculating the due date for payment of an adjudicated amount, because a respondent has a statutory entitlement to counterclaim, it may be appropriate to streamline the provisions of the BCIPA amendments to limit confusion wherever possible. For instance, the due date for payment of a progress claim or *other claim* awarded by the Adjudicator may be calculated according to the earlier of the following dates:
 - (i) The time calculated under the domestic building contract; or
 - (ii) Where the domestic building contract does not provide for the matter:
 1. 10 business days after a payment claim is served on the respondent; or
 2. Where a counterclaim is successfully decided in favour of the respondent, 10 business days after the payment schedule is served on the claimant.
- t. In relation to the calculation of interest payable on the unpaid amount of an adjudicated amount, it is envisaged that interest can be calculated on the greater of the following rates:
 - (i) The rate prescribed under s.48(1) of the *Supreme Court Act 1995* for debts under a judgment or order;
 - (ii) The rate specified under the domestic building contract.
- u. Section 67P of the QBSA Act would not apply to the calculation of interest under the domestic adjudication regime.

Adjudication Certificates – ss.30 & 31

- v. The domestic adjudication regime will require similar provisions to those contained in s.30 of the BCIPA but will need to reflect the fact that:
 - (i) An adjudicator may in certain cases find that the claimant must pay the respondent a sum of money;
 - (ii) Neither claimant nor respondent will have the statutory entitlement to suspend the works, but that does not prevent the parties from so doing under the contract.
- w. The successful party will also be able to ask the ANA for an adjudication certificate which may be registered as a judgment for a debt in a Court of competent jurisdiction.

Costs of the Domestic Adjudication Process – ss.34 & 35

- x. It is envisaged that the costs of the process will remain “user pays”. There will therefore be no drain on the public purse.
- y. The Adjudicator will have the authority to determine which party will bear the costs of the Adjudicator and the ANA. The commercial adjudication regime has demonstrated that many Adjudicators adopt the principle that “costs should follow the event”, meaning, the unsuccessful party must pay the costs of the process. Costs are limited to those of the Adjudicator and the ANA. The Adjudicator will not be able to award the costs of preparing or defending the parties’ respective claims.
- z. There has been some debate over whether the costs of the domestic adjudication process should be governed by regulation, particularly those applications at the lower end of the financial scale. It is the writer’s view that given the significant competition in the market place by the various ANA’s, regulating fees and charges is not necessary. The “adjudication industry” in Queensland has proven over the past 5 years that it is able to deliver cost effective contract dispute resolution without the intervention of government in respect to fees and charges.

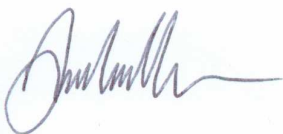
No Statutory Entitlement to Suspend the Works – s.33

- aa. It is envisaged that neither party would have a statutory entitlement to suspend the works under BCIPA for non-payment as a claimant using the existing legislation may do under s.33. That would not prevent a claimant domestic building contractor from suspending works for non-payment or any other valid reason pursuant to the provisions of a domestic building contract.

Miscellaneous

- bb. It is envisaged that s.98 of the DBCA may be amended to include an express provision that the relevant amended part of the BCIPA **DOES** apply to domestic building work involving a domestic building contractor as one party and a resident owner as the other party.

32. Adjudication of building disputes has proven to be a fast, efficient, cost effective “user pays” method of resolving disputes in the building and construction industry. The success of the BCIPA is measured by its use by the industry at large. Put simply, if the regime did not work, industry would not use it, just as, by and large, the use of the SCA has been relatively limited, in comparison to the use of the BCIPA.
33. Anecdotal evidence would suggest that the parties of many adjudication applications do not exercise their rights under s.100 of the BCIPA. That is, after 5 years of operation of the BCIPA, many parties appear to accept that an independent third party has reviewed the evidence put forward by both parties, and come to a measured conclusion based on that evidence. It appears that many parties do not seek to enforce their contractual rights through the Courts after the adjudication process, although that option remains open to them.
34. It is submitted that the successful operation of the existing adjudication process can be replicated in the domestic building sector to assist both domestic building contractors and resident owners alike, provided adequate safeguards are enacted to protect unwitting consumers.
35. It is also submitted that the safeguards discussed above will in fact lead to an increase in compliance with the provisions of the DBCA. If a domestic building contractor learns of the benefits that the proposed amendments may provide to his or her cash flow, they may be less inclined to readily or recklessly depart from the requirements of the DBCA in the knowledge that if they do so, they will lose all entitlements to domestic adjudication under the BCIPA (as amended).
36. Far from being a drain “on the public purse”, domestic adjudication is likely to result in less matters coming before the Courts, the CCT and as of 1 December 2009, QCAT. This will ultimately result in cost savings for government.
37. Domestic adjudication is not without its flaws and challenges which will need to be addressed prior to its implementation should that be the desire of the State Government. It will not be the panacea which will cure the ills of the domestic sector of the building and construction industry. However, the writer welcomes any feedback or further suggestions on the contents of this paper or on how a domestic adjudication scheme could be better implemented. It is suggested that a wide consultation process with industry stakeholders be undertaken where, it is likely that many of the challenges both identified and yet to be identified, may be resolved.



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