

22 February 2013

Payment Dispute Resolution - Discussion Paper
Queensland Building Services Authority
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Dear Sir/Madam,

The Electrical Contractors Association (ECA) welcomes the opportunity to provide input into the QBSA's Inquiry into the operation and effectiveness of the *Building and Construction Industry Payments Act 2004 (BCIP Act)*.

Established in 1937, the **Electrical Contractors Association (ECA)** has been representing electrical contractors for more than 75 years, making it one of the longest-standing industry associations of its kind. It is a dynamic and modern trade association recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. ECA is registered as an industrial organisation under Queensland legislation with its operation in Queensland. The association's website is: <http://www.masterelectricians.com.au/page/ECA/>

Master Electricians Australia Ltd (MEA) is a not-for-profit organisation that provides a national accreditation program to electrical contractors seeking to differentiate themselves from other contractors. MEA is part of the ECA Group of Companies and operates nationally. The organisation's website is: <http://www.masterelectricians.com.au>.

References to the ECA and opinions expressed by the ECA, within this submission, should be read as both the Electrical Contractors Association and Master Electricians Australia.

Our overall comment on the *BCIP Act* itself is the overly legalistic nature of the legislation. While we accept the need for legislation to be articulated in a certain way, there is a need for a plain English version of the rules of the *BCIP Act* to be made available. For such an important piece of legislation there is a great deal of confusion about its application amongst the subcontractors who stand the most to gain from it.

QUESTION 1: Do you think the jurisdiction of *BCIP Act* should be reduced to specifically exclude payment claims for some types of work or work over a stated value? If so, what should be excluded?

ECA would not be in favour of the jurisdiction of the *BCIP Act* being reduced in this manner. As noted in the Discussion Paper, the value of a contract does not necessarily mean that all claims under the contract will be complex or for a large amount. Setting the contractual value could also be problematic.

QUESTION 2: Do you think that the respondent needs to be more clearly identified in the contract in relation to who should receive a payment claim under the *BCIP Act*?

ECA makes no comment on this point.

QUESTION 3: Do you believe that the *BCIP Act* should allow other types of payment claims, including claims by purchasers, to be subject to adjudication?

ECA would not agree with the proposal that the *BCIP Act* allow other types of payment to be subject to adjudication. Broadening the scope of the legislation has the potential to dilute from the primary intent of the *BCIP Act* which is to provide greater security of payment for building contractors in the construction industry. Claims by other parties, such as purchasers, are best dealt with by alternative regulatory mechanisms.

QUESTION 4: Should the *BCIP Act* be amended to allow an adjudicator to direct payment in favour of the respondent for an amount greater than the claim?

Subcontractors are in an inherently inequitable bargaining position in relation to head contractors, with far fewer resources available to them. An adjudicator's decision requiring payment to a respondent head contractor could potentially cripple a subcontractor who had not anticipated an adverse financial judgement. The *BCIP Act* is intended to address the bargaining imbalance between a head contractor and subcontractor, not deepen it. In light of this, we would oppose the inclusion of such an amendment in the *BCIP Act*.

However, if vexatious claimants are of concern, a possible means to deter the making of such claims would be giving adjudicators the authority to award costs to respondents who have been subject to claims of this nature. The possibility of an unfavourable costs order would likely discourage a claimant seeking to take advantage of the system by making a frivolous claim.

QUESTION 5: Do you believe the type of payment claim under the *BCIP Act* should be restricted?

Given the intent behind the legislation, ECA would oppose any restriction on the type of payment claim that can be made under the *BCIP Act*. We acknowledge that some respondents may consider the ten day statutory timeframe for serving a payment schedule to be narrow. However, it is likely that these respondents will have more resources at their disposal to organise such a payment schedule, as opposed to the claimant subcontractor whose business may be suffering from the limit to cash flow. Forcing subcontractors, many of whom fall into the small business category, to be involved in lengthy and expensive legal proceedings to claim money they are rightly entitled to, would only worsen the inequitable bargaining position inherent in construction contracts. It is also true that if the respondent is meeting their payment obligations to subcontractors they have nothing to be concerned about.

If any restriction on payment claims is considered, we urge regulators to continue to allow for extras and variations claims to be included. Being able to make such claims is of critical importance to subcontractors, particularly electrical contractors working in the construction industry, who rely on such payments to keep their businesses afloat. Many subcontractors would be put under severe financial stress if forced to pursue extras and variations claims through the court system as opposed to the *BCIP Act*. The time and resources that would need to be dedicated to legal action would be prohibitive for many small business owners. This would only exacerbate the inequitable bargaining position that already exists between head contractors and subcontractors.

QUESTION 6: Should *BCIP Act* be expanded to allow adjudicators to require the release of a security, such as a bank guarantee?

We would strongly support adjudicators being given the power to release a security, such as a bank guarantee or cash retention, held under a construction contract.

Adopting this process, or something similar, would accord with the intent of the *BCIP Act* by ensuring subcontractors receive the payments they are entitled to without needing to embark on costly court proceedings.

QUESTION 7: Should claimants be required to reference *BCIP Act* on payment claims if they want to be entitled to rely on the *BCIP Act*?

ECA would not be in favour of requiring a reference to the *BCIP Act* on payment claims if parties want to be able to rely on the *BCIP Act*. The invoice issued by the claimant for the work performed should be sufficient to activate the provisions of the *BCIP Act*.

QUESTION 8: Do you consider the current process of authorised nominating authorities appointing adjudicators appropriate?

While the potential for bias inherent in the current system for appointing adjudicators is minimal, the perception of bias may be problematic for the effective administration of the *BCIP Act*. An alternative may be to appoint an officer in charge of the authorised nominating authorities. This officer would be responsible for evenly allocating cases to adjudicators to ensure a fair and equitable resolution process for all parties. Statistics on adjudication outcomes would need to be compiled in order to ensure that no bias is demonstrated by any adjudicators.

There may also be some advantage to adjudicators being appointed who are subject matter specialists to decide on the relevant claims. For example, an adjudicator with knowledge and expertise in the electrical trade would be better versed to understand the industry and the nature of the work. They could then make an informed decision about a specific claim that involves an electrical contractor.

QUESTION 9: Do you believe that the timeframes for the making of and responding to claims under the *BCIP Act* are appropriate (currently up to 12 months)?

Given the likelihood of a claimant subcontractor having far fewer resources at their disposal to compile an accurate claim under the *BCIP Act*, and the importance of the monies owed to the survival of their business, the current 12 month response timeframe seems appropriate. However, to ensure respondents are given adequate time to respond to claims, it may be fitting to extend the response time in accordance with the time taken to lodge a claim. For example, a claim lodged after three months would require a response within 10 days but a claim lodged after 9 months would attract a 20 day response period.

QUESTION 10: Do you believe the *BCIP Act* allows persons who carry out construction work or supply related goods and services to serve large and complex payment claims in an untimely and unfair manner?

As with any system, there is potential for abuse of the *BCIP Act* by the parties involved. This could include serving large and complex claims in an untimely manner. However, we would again argue that if a head contractor is fulfilling their payment obligations and keeping the required documentation, they do not have to be concerned with the size or nature of payment claims being served upon them.

QUESTION 11: Should the *BCIP Act* allow claimants, at the lodgement of an adjudication application, to place a charge on monies owing to a respondent head contractor by a principal?

ECA would strongly agree with this proposal that would allow claimants to place a charge on monies owed to a respondent head contractor by a principal. This will facilitate subcontractors receiving the payments they are entitled to in a timely manner.

QUESTION 12: Is security of payment an issue for retentions? If so how do you think this could be improved?

A problem commonly encountered by electrical subcontractors involves a head contractor at a building site holding retention monies until they are satisfied that the work on a project has been completed. The subcontractor is then put in the difficult position of being subject to the principal contractor's opinion on the quality of the electrical work they have performed. In the meantime, the retention monies held are accumulating interest for the head contractor while the electrical contractor is left unpaid for the work they have performed. While we acknowledge that these securities should be held for the duration of the defects liabilities period, there are some cases where these securities are retained for an extended period of time and/or for reasons unrelated to the particular subcontractor.

In terms of payment security, there is also the issue of head contractors using retention monies from subcontractors for their own purposes with a client. Problems arise when repayment is not made to the subcontractor until the end of the defects liability period or even beyond that time period in some circumstances.

In order to overcome this situation and prevent subcontractors being out of pocket for their work, ECA proposes the creation of a system whereby retention monies go to Escrow pending completion of the relevant works. This system could be created by the *BCIP Act* and enforced by adjudicators. The system would be similar to the process adopted by the Residential Tenancies Authority (RTA) in which the bond paid by a tenant at the start of a lease is refunded in full provided no damage or loss has been incurred by the owner. An industry or government trust style fund could be established for the building industry where these retention monies could be held pending project completion. Introducing this system would undoubtedly involve establishment costs, however, it would also create a more equitable balance between the interests of principal contractors and the subcontractors engaged on a project who are lawfully entitled to payment for the work they have performed. As is the case with landlords provided with some security for loss through the RTA, this system would also continue to protect the rights of consumers by ensuring work is performed to a certain standard in order for funds to be released.

QUESTION 13: Do you believe that some respondents are misusing the legal process by commencing Supreme Court proceedings to delay the payment of an adjudicated amount? If so, what if any changes to the *BCIP Act* should be made to help address this issue?

There may be incidences in which head contractors have attempted to delay payment of an adjudicated amount by commencing Supreme Court proceedings. In order to overcome this problem, we would suggest the suspension of any Supreme Court proceedings until the finalisation of the relevant *BCIP Act* claim. Other alternatives may also be to require a respondent to first obtain leave to appeal or limiting the right to appeal to cases where it is deemed to be in the public interest.

QUESTION 14: Are there any other issues you wish to raise in relation to the effectiveness of the *BCIP Act* process or the jurisdiction of *BCIP Act*?

Unreasonable contract terms are a significant issue for those conducting business in the construction industry. In order to overcome the problems that can arise, there may be merit in a standard contract being created by the *BCIP Act* for contracts valued at under \$20 million.

QUESTION 15: Would you support the making void of any unreasonable timeframes for notification of extension of time requests within contracts?

If a minimum timeframe was set by legislation how many business days do you believe are reasonable for an extension of time request?

ECA would agree with making void unreasonable timeframes for notification of extension of time requests within contracts. The current industry standard of between three and five days puts significant pressure on subcontractors who are required to not only advise of the related “critical event” but also meet the administrative requirements associated with such a notification.

We believe a minimum notice period of 10 business days for extension of time requests would be appropriate. This would ensure the project is able to progress at the required pace without placing an undue burden on subcontractors to put together a detailed claim.

QUESTION 16: Would you support the making void of any unreasonable timeframes for notification of variations within contracts?

If a minimum timeframe was set by legislation how many business days do you believe are reasonable for a variation to be lodged?

ECA would support the making void of any unreasonable timeframes for notification of variations within contracts. Asking subcontractors to give full details of a variations claim, including the legal basis upon which their claim is based, within a limited timeframe is often times an impossible task. ECA recommends a more reasonable minimum notice period to lodge a variation would be 20 business days.

In order to improve payment security to subcontractors, we would also propose that all variations be able to be submitted as progress claims. Variations could then be subject to a contractual approval process that would enable payment in the same time period as progress claims.

QUESTION 17: Would you support making void a provision in a construction contract which entitles a purchaser to terminate a contract for convenience?

Alternatively, do you believe that all construction contracts should provide for a party to be able to claim for loss of profit when a contract is terminated for convenience by the other party?

Ideally, ECA would be strongly in favour of making void a provision in a construction contract which entitles a purchaser to terminate a contract for convenience. Subcontractors can often bear the financial brunt of this situation, particularly those in small business with very slim profit margins.

Should the decision be made not to make such a provision void, the right for subcontractors to make a claim for loss of profit in these circumstances must be an available option in all construction contracts.

QUESTION 18: Do you believe that the *BCIP Act* requires amendment to specifically address preconditions and other contractual provisions which purport to unreasonably and unfairly restrict the application of *BCIP Act*?

If so:

- **What do you consider to be unreasonable and unfair preconditions and what approach do you believe should be taken to address such preconditions?**
- **Do you believe adjudicators should be given the statutory power to declare such contractual provisions void?**

One example of a contractual provision that can restrict the application of the *BCIP Act* is a term which mandates participation in a dispute resolution process before a payment claim can be lodged under the *BCIP Act*. Such a precondition can be used by head contractors to slow down the cash flow of subcontractors and increase legal costs, thereby putting pressure on subcontractors to resolve disputes by not pursuing justifiable claims. This demonstrates the inherent capacity for the inequitable bargaining positions between contractor and subcontractor to be taken advantage of. Given that the intent of the *BCIP Act* is to overcome this imbalance and prevent any limits to cash flow, such a contractual provision and others like it must be adequately addressed in any amendments to the *BCIP Act*. It is essential that adjudicators have the statutory power to declare such contractual provisions as void.

QUESTION 19: Do you have any concerns about a legislative amendment being made to the *BCIP Act* to make clear that a statutory declaration attesting to the payment of workers, subcontractors and sub-subcontractors is a valid precondition to the submission of a payment claim?

ECA would oppose such a legislative amendment being included in the *BCIP Act*. Contractors can make this declaration believing the statement to be accurate, with no guarantee that workers down the line of subcontractors have met their payment obligations for the life of the project. A statutory declaration of this nature is of limited, if any, value and is merely an unnecessary obstacle to a valid payment claim.

CONCLUSION

Overall, the ECA is optimistic that this inquiry will result in the improved operation of the *BCIP Act* for the benefit of the building sector, consumers and wider industry. ECA would be eager to participate in any further consultations to detail our members' experiences with the *BCIP Act* to better inform this inquiry. We would also anticipate that any consultations include as a priority developing strategies for providing plain English information about the *BCIP Act* to subcontractors to aid in their understanding of this complex legislation.

Yours sincerely,



Stephen King
State Manager - Queensland