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29 September 2010

BCIPA Discussion Paper
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Dear Sir,

BCIPA DISCUSSION PAPER

Thank you for the opportunity to comment on the BCIPA Discussion Paper released in August 2010. The issues referred to in the Discussion Paper have been considered by the Construction and Infrastructure Committee of the Society and the QLS ANA's panel of adjudicators and both have contributed to this response.

Referring to the specific issues addressed in the Discussion Paper, the Society notes:

1. Is the BCIPA achieving its objectives?

Compared to the process in certain states such as Victoria, the BCIPA (Qld) has provided a relatively quick method of resolving payment disputes where the parties are familiar with the procedure. However, the experience of the Society as an ANA is that the process for the uninitiated can be quite difficult due to the relatively unsophisticated clientele and the differing, alternative timeframes that are dependant on whether a payment schedule is received. Some of our adjudicators have suggested the payment schedule should require an endorsement such as "This is a payment schedule made under the Building and Construction Industry Payments Act 2004" to assist in determining whether s18 of the Act has been satisfied.

2. Does the BCIPA unduly favour claimants?

The statistics support the experience of the QLS ANA that the BCIPA does not unduly favour claimants though there is some public and legal perception that certain ANAs are pro-claimant. Whether this perception is correct is irrelevant as its mere existence erodes some public confidence in the impartiality of the process. It should be noted that the approach and considerations of a commercial ANA might also differ to those that are operating more as a member service.

3. Are payment claims being used inappropriately (resulting in ambush claims)?

The Society supports the proposed amendment to s 24 of the BCIPA to increase the time to 10 business days for a respondent to provide an adjudication response. This also removes the confusion over alternative timeframes of "the later of 5 business days...or 2 business days..." presently specified in that

section. An alternative is to extend the time in which a respondent can provide a payment schedule in s18 of the Act from 10 business days to 15 business days to reduce the impact of “ambush claims”.

4. Has adjudication become too complicated?

Clarification of s17 (5) with regard to repeat payment claims where a payment claim has been served but no adjudication application has been lodged is needed in view of contrasting decisions in *Doolan v Rubikcon (Qld) Pty Ltd* [2007] QSC 168 and *David Spankie v James Trowse Constructions Pty Limited* [2010] QSC 336. Many claimants apply the BCIPA wording “This is a payment claim under the BCIPA” to their invoices without realising that they must action the application within very stringent timeframes particularly if work has been completed. Commercially, reminder invoices containing the BCIPA wording are common and should be allowed without loss of a claimant’s statutory entitlements if an adjudication application is not lodged at that time.

5 (1). Should s26 of the BCIPA be amended to specifically require an adjudicator to decide jurisdiction?

Whether s26 should be amended to specifically include a “ruling of jurisdiction” is dependant on whether you consider the BCIPA and its adjudicators are limited to determining the value of the payment claim in accordance with the contract. The object of the Act “is to ensure that a person is entitled to receive, and is able to recover progress payments if the person undertakes to carry out construction work under a construction contract...” The Society has received competing views where some practitioners believe that as not all adjudicators come from the legal profession, they should not be placed in a position of having to decide complex issues of jurisdiction. In contrast, others have indicated that as adjudicators must initially decide on basic issues of jurisdiction, such a ruling of “no jurisdiction” should be made available to them rather than having to decide a “nil” amount due to an application being invalid on jurisdictional grounds. The Society suggests that a ruling of “no jurisdiction” be made available to adjudicators but limited to those requirements espoused in the *Brodyn* decision.

5 (2). Should the BCIPA be opened up to facilitate a special form of domestic adjudication?

The Society notes receiving differing views from its members. One view is that there is a class of resident owners who should be in the same position as other respondents under the BCIPA. These can be classified as “serial renovators” or those resident owners who are engaged in building works for over \$500 000.00 who are sufficiently sophisticated and commercially experienced enough to seek legal and other advice when disputes arise. However, any such domestic adjudication model should stringently protect “Mum and Dad” resident owners who do not fall in the above category.

It is also submitted that a need for a specialised class of domestic adjudicators is not required. There are already experienced adjudicators who are qualified to decide domestic adjudications. The BCIPA has shown that legal issues including deciding between competing evidentiary submissions are routinely part of adjudications. Courts regularly consider specialised areas involving complex scientific matters which are the subject of competing expert reports. It can reasonably be expected that resident homeowners will logically seek evidence from building consultants regarding rectification issues including the cost of rectification. This is well-established in QCAT proceedings and was very common in CCT proceedings before QCAT.

An opposing view received is that any form of domestic adjudication will be more regulated than commercial adjudication and as a result, could become a highly complex process for “Mum and Dad” resident owners who may only deal with the process once in their life when they build their home. There is the added issue of dealing with a heightened emotional response when engaged with homeowners as

opposed to parties who are in a commercial building arrangement. There are also concerns that there may be a high degree of inequity with the builder controlling the process by bringing the payment claims and selecting the ANA against homeowners completely unfamiliar with the process. The Society acknowledges the merits of both views.

Thank you for the opportunity to comment on the issues raised in the BCIPA Discussion Paper 2010.

Yours sincerely

Peter Eardley
President