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Our ref: Construction and Infrastructure Law Committee
Mining and Resources Law Committee

22 February 2013

Payment dispute resolution - Discussion Paper
Queensland Building Services Authority
GPO Box 5099
BRISBANE QLD 4001

[redacted]

Dear Mr Wallace

Payment dispute resolution in the Queensland building and construction industry – discussion paper

Thank you for the opportunity to provide comments in response to the discussion paper titled 'Payment dispute resolution in the Queensland building and construction industry', dated December 2012 (**Discussion Paper**).

The Queensland Law Society is the membership association for the solicitors of Queensland and also operates an Authorised Nominating Authority under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**).

The QLS has a number of committees of specialist legal practitioners who consider the legislative and policy implications of law reform proposals. The Society often makes submissions on matters of the operation of existing laws and policy matters to reach the ultimate goal of good law in our State.

In this case the Society's Construction and Infrastructure Law Committee and Mining and Resources Law Committee have an interest in the Discussion Paper. There is some disparity between these two committees on certain aspects of the Discussion Paper and accordingly the views of each committee have been represented separately. The views of the Construction and Infrastructure Law Committee appear at pages 2 to 4. The views of the Mining and Resources Law Committee appear at pages 5 to 16.

If you would like more information on the views of the Society's committees please do not hesitate to contact either Ms Grace van Baarle on [redacted] or Mr Matt Dunn on [redacted].

Yours faithfully

[redacted]

Annette Bradfield
President

CONSTRUCTION AND INFRASTRUCTURE LAW COMMITTEE COMMENTS

Question 1 (see also Question 5): Do you think the jurisdiction of the BCIP Act should be reduced to specifically exclude payment claims for some types of work or work over a stated value?

No. The Committee submits that with regard to more complex applications, the respondent can apply for to the adjudicator a longer period to provide an adjudication response of up to twice the current time frame. The BCIP Act would also need to nominate the considerations relevant to granting an application. This continues to support the objects of the BCIP Act and provides a more even playing field for the respondent (given the time generally available to an applicant) in a high value, high complex matter.

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

There would be difficulty making specific provision in the legislation as the Act applies to oral contracts and to arrangements, not only just written contracts.

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? If so, what changes would you suggest?

No. As this is contrary to the original purpose of the BCIP Act and would only result in an increase of complex claims being dealt with in short statutory time frames.

Question 5: Do you believe that the type of payment claim under the BCIPA should be restricted?

No as referred to in Question 1.The legislation has now been in force for 9 years.

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

Yes. As the BCIP Act enables the adjudicator to consider retention moneys or a cashed bank guarantee or bond, there should be no reason why the adjudicator should not be able to consider the original bank guarantee or bond.

The Discussion Paper focuses on a power to order the return of bank guarantees. The Committee recognises that there appears to be a policy difference in allowing cash security/retention money to be the subject of a decision but not bank guarantees. First, perhaps both should not be subject to a claim under the Act. An adjudication decision is an interim decision. The return of any security (whether in the form of cash or bank guarantee) is likely to impact on the security holder in a final sense (eg. it is unlikely that a decision to require the bank guarantee be returned will be reversed and the loss of security can be significant). One step might be to expand the power in sections 67S

and 67T to more contracts to allow for a bank guarantee to be lodged to replace security, thus allowing security to be retained but cashflow facilitated.

Question 7 – Should claimants be required to reference BCIP Act on payment claims?

Yes. The Committee strongly supports the continued referencing of BCIP Act in payment claims. There is enough confusion surrounding the service of a payment claim which would be compounded if referencing was removed from an invoice. With tight statutory time frames, it is critical that the respondent be given notice that the statutory process has begun.

Question 8 – Do you consider the current process of authorised nominating authorities appointing adjudicators appropriate? If not, what alternate system would you propose?

The Committee submits that the parties should be allowed to nominate the ANA in the construction contract as is available in Western Australia and the Northern Territory or alternatively nominate 2 or 3 ANA's from which the claimant may select.

Another option is to allow parties to agree an adjudicator for an adjudication. Proposed names could be submitted at any time, by either party after the payment schedule is submitted. If an adjudicator is not agreed at the time an adjudication application is delivered, either party can apply to a court "on the papers" (using only standard forms/procedure), for an adjudicator to be appointed.

This would remove the current **perception** within the industry of "claimant friendly" ANAs/adjudicators. The industry's "perception of bias" in adjudications in favour of claimants is not something which would be tolerated in relation to the judicial system. The proposed system of appointment would result in the use of adjudicators who produce "quality decisions", as they would be agreed by both parties or appointed by an independent judicial body (using a streamlined and standard process)."

Question 9 – Do you believe the timeframes for the making of and responding to claims under the BCIP Act are appropriate?

Please see Question 1.

In considering this issue you may also wish to consider whether the provisions under the BCIPA are adequate for the Christmas and Easter periods.

The Society supports amending 'business day' in the BCIP Act to specifically exclude the Christmas and New Year period as it is accepted practice that the construction industry in Queensland closes for a minimum two week period (25 December to 7 January) during this time.

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? If so, are changes necessary to address this and what should they be?

As previously discussed in Question 1 the Committee submits that such claims could be dealt with by allowing longer time frames to the respondent on complex applications.

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

No. However the Committee submits that a charge could be considered after the adjudication decision has been provided depending on the outcome of any review of the Subcontractors' Charges Act 1974.

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

No. The interim nature of the BCIP Act should not allow retentions to be the subject of a decision.

Question 13: Do you believe some respondents are misusing the legal process by commencing Supreme Court proceedings to delay the payment of an adjudicated amount?

No. As previously noted, the Committee does not believe that respondents are misusing the legal process as noted in the Discussion Paper. Limited grounds are available to challenge adjudication decisions in the Supreme Court and challenges can generally be hear expeditiously.

Strategies to limit challenges should focus on steps to ensure that the adjudication decisions are of a high quality (eg. high quality adjudicators being used; appropriate time in which to give decisions; removal of industry's perception of bias of the adjudication process in favour of claimants).

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

The Committee submits that further clarification of section 16 of BCIP Act to clarify that release of retention under a subcontract which is contingent on the end of the defects liability period is not void where that defects liability period is tied to expire when the defects liability period under the main contract expires.

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 the BCIP Act?

The Committee comments that it would be consistent with BCIP Act to allow for statutory declarations as to payment of workers to be a pre-condition.

MINING AND RESOURCES LAW COMMITTEE COMMENTS

The Mining and Resources Committee (**Committee**) is comprised of experienced legal practitioners who work within the mining and resources sector on a daily basis. They are uniquely familiar with the practical issues faced by both resource companies and contractors within the current legislative framework.

The Committee has adopted the following objectives:

> *The Mining and Resources Committee aims to monitor and, where appropriate, comment on laws and polices relating to mineral resources, petroleum and gas exploration, production, related infrastructure and safety regulation (as well as the scope of the mining jurisdiction of the Land Court, but not its practice or procedure), with a view to advocating that these laws and polices:*
>
> - *reflect fundamental legislative principles*
> - *comply with legislative standards on transparency, accountably and consistency*
> - *achieve their stated aims without giving rise to unintended consequences in implementation.*
>
> *The Committee does not propose to have an educational role or be an advocate of any particular stakeholder group in the mining and resources industry. The Committee does not see its role as commenting on the marketing and sales of mineral resources, petroleum or gas, taxation, funding arrangements, native title, general property issues, planning and environment or occupation health and safety issues.*

The Committee does not have any association with the operational functions of the Queensland Law Society, including its role as an Authorised Nominating Authority.

The Committee supports the objects of the BCIP Act. There is no doubt it has played a significant role in addressing cash-flow and solvency issues in the local building industry. It has also had some less positive outcomes. For principals and head contractors working on major construction projects in Queensland, the BCIP Act has led to increased cost, resourcing, complexity and uncertainty of contract administration.

The Committee welcomes the opportunity to provide comment on the important questions raised in the Discussion Paper. The review is timely. The construction industry in Queensland, which now involves a number of multi-billion dollar international resource projects, is a very different industry to that which existed in 2004 when the legislation was first introduced. The Committee submits that legislative reform of the BCIP Act is required to more appropriately reflect the diverse nature of the construction industry in Queensland, as described in further detail below.

Question 1 (see also Question 5): Do you think the jurisdiction of the BCIP Act should be reduced to specifically exclude payment claims for some types of work or work over a stated value?

Yes. The Committee submits that it would be difficult to reconcile the objects of the BCIP Act with its application to high value, high-end complex construction work performed by sophisticated energy and resources companies for the reasons set out below.

The BCIP Act, and similar legislation in other Australian states, are aimed at addressing inherent imbalances in bargaining power which exist between small subcontractors and head contractors. This view is supported by the BCIP Act Explanatory Notes and the second reading speeches for the BCIP Act and similar legislation in other Australian states enacted for the same purpose (such as the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**) and the *Construction Contracts Act (2004)* (WA) (**Western Australian Act**).

The Explanatory Notes state that a failure of any one party in the contractual chain to honour its obligations can result in restricted cash flow and, in some cases, insolvency.

The second reading speech for the NSW Act states that '*it is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families*'. They do not have the cash flow allowing them to keep on working while waiting for payment.

Contractors and subcontractors who undertake construction work for resources sector companies are typically large sophisticated constructors. They are not typically small contractors and subcontractors because of the complex nature and scale of the work and because of the particular financial, safety and performance standards that are required. This means that for resources projects, the claimants that are using the BCIP Act are typically large and sophisticated contractors.

The security of payment legislation was never intended to apply to multi-million dollar (and often multi-billion dollar) contracts between major national and international companies. Moreover, there are various reasons why such construction contracts and claims should be excluded from the jurisdiction of the BCIP Act:

- The claims are often for very significant amounts (far in excess of what is reasonable and appropriate for determination under the rapid interim adjudication regime for which the BCIP Act was enacted to provide).
- The contracts are often complex, lengthy, bespoke agreements and the material associated with the claims and dispute is often voluminous.
- The issues raised are often complex legal and technical issues and require detailed expert evidence.

In the recent Queensland Supreme Court decision in *John Holland*[1], it was noted by court, in obiter:

> '*A great deal of time and expenditure was undoubtedly invested in the preparation of the claim and payment schedule and the adjudication application and adjudication response. The thoroughness with which they were presented bordered on prolixity. I understand that this is a feature of many adjudications under the BCIP Act. While I appreciate that the quantum of progress claims made under the Act can be very high, and that the outcome of the adjudication can have serious consequences for the liquidity of either or both of the parties, I doubt that the Legislature envisaged such a development. The adjudication process may be more suited to comparatively small, uncomplicated claims than to large, complex claims.*'

[1] *John Holland Pty Ltd v Walz Marine Services Pty Ltd* (2012) 28 BCL 62

It is also the case that these contracts are often international and involve foreign choice of law and principles of international law. Adjudicators are not very well equipped to deal with such claims, particularly within the statutory timeframes.

Unfortunately the process of rapid adjudication is also an anathema to foreign investors. The entry into, and administration of, major project construction contracts involves the management of internal and external stakeholders. These typically include shareholders, joint venture partners, financiers and other credit agencies. Each of these stakeholders have invested in the construction work with an expectation that the work under the contract (and any disputes) will be managed in accordance with the agreed contractual terms and well-established legal principles. That is not always the outcome that is achieved through a rapid statutory-based adjudication process.

The BCIP Act currently does not impose any monetary threshold on payment claims. It currently permits virtually all claims to be the subject of a payment claim (regardless of what has been contractually agreed) and imposes an unreasonably tight time frame of 10 business days for respondents to both review and respond to payment claims and an even tighter time frame of 5 business days for respondents to both review and respond to adjudication applications. These time frame are the same, regardless of the size or complexity of the payment claim or adjudication application. This regime is not suitable for large or complex claims of which the Queensland resources sector is renowned.

To address these issues, the Committee submits that the BCIP Act be amended so as to, at a minimum, impose a monetary threshold on payment claims, regardless of the nature of the work or the value of the contract. The introduction of a cap such as this would not only be consistent with the objectives of the BCIP Act, it would also provide parties with an opportunity to exercise their rights under the agreed contractual dispute resolution regime in line with their own business strategies.

The monetary threshold should be determined through further research and industry discussion. It could be calculated by reference to the claim value as opposed to by reference to contract value. Valuation is a familiar exercise in the building and construction industry and is necessary for the purposes of the current BCIP Act (for example see section 17(2)(b)) BCIP Act). Any perceived difficulties in the valuation exercise per se should not prevent the making of an agreed monetary threshold.

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

Yes. The Committee submits that the BCIP Act (in particular section 17(1) of the BCIP Act) should be amended to require payment claims to be served upon the contractually agreed person and at the contractually agreed location.

These amendments would overcome the current uncertainty within the industry as to whether, in the absence of an express contractual term, service upon a person such as a superintendent is sufficient service for the purposes of section 17(1) of the BCIP Act. Other issues that may arise include the service of BCIP Act claims on one or more companies that are associated with the respondent (such as joint venture partners or ultimate principals under an agency arrangement).

These amendments would improve fairness in the payment claim procedure by ensuring both parties agree up front on the identity and location of the respondent, which is especially important

given the harsh consequences that arise where a respondent does not adhere to the strict timeframes upon receiving a payment claim.

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? If so, what changes would you suggest?

No. The Committee submits that, although there may be some perceived advantages with this proposal (such as that it may create a more even playing field and introduce an element of risk for contractors who are using the BCIP Act to make ambit claims), this proposal should not be accepted because to do so would enable a purchaser to potentially claim and recover money in excess of the amount originally claimed by a contractor. This would not only be contrary to the original purpose of the BCIP Act but it would only serve to increase the volume and complexity of claims heard by adjudicators, which would not be desirable given the short statutory time frames and limited rights of review for respondents.

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

No. Bank guarantees are usually provided in high value construction contracts, where the contracting parties are sophisticated and of respectable financial standing.

Further, the BCIP Act is intended to address cash-flow problems in the construction industry caused by the withholding of progress payments. Bank guarantees are not usually a cash-flow issue. They are a performance bond provided by a contractor and are often the only contractual protection which a principal or purchaser has against a contractor's default under a contract.

Moreover, the case law relating to calling on security is fairly complex, although well-developed. Many adjudicators appointed under the BCIP Act, some of which are not legally trained, would be ill-equipped (in terms of expertise, experience and available time) to make determinations on non-monetary matters such as releasing security.

Furthermore, as the relief obtained under the BCIP Act is only interim in nature, so would any determination on security. It would not therefore reduce the initiation of urgent court proceedings by parties in relation to bank guarantees (which is the usual course of action taken) although it might very well increase the amount of urgent injunctive and declaratory relief being obtained.

Question 7 – Should claimants be required to reference BCIP Act on payment claims?

Yes. Contractual payment regimes are separate and distinct from the statutory regime imposed by the BCIP Act. Each regime will have their own requirements (including different timetables and procedures) as well as consequences for breach. It is therefore essential that a respondent is given clear notice where a claimant has invoked the statutory process instead of the contractual process.

Therefore, the Committee submits that the BCIP Act should continue to require all payment claims to expressly reference the BCIP Act and, further, be amended to require such claims to conform with a prescribed set of requirements (which could be dealt with in the regulations). These

amendments would not only make the statutory claim procedure fairer (by enabling a respondent to be able to better recognise a payment claim), they would also provide clarity for a claimant by making them aware of what requirements they must satisfy when making a payment claim.

Question 8 – Do you consider the current process of authorised nominating authorities appointing adjudicators appropriate? If not, what alternate system would you propose?

No. The Committee submits that a process which allows one party to unilaterally appoint a decision-maker (or in this case, an ANA) is open to abuse and may lead to the apprehension of bias and prejudice against respondents. This may, in turn, lead to increases in litigation and associated costs.

The test for apprehended bias in Australia as established by the High Court is that:

> *[the] principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.*[2]

This test comes from the long standing principal that "*not only must justice be done; it must also be seen to be done.*"[3] It is unnecessary to consider actual bias (which is a higher and more difficult standard to establish) when the test for apprehended bias has been satisfied.[4]

The test for apprehended bias applies not only to judicial decision-makers, but also to statutory decision-makers.[5]

The current process for selection of adjudicators may, or may be seen to, promote impartiality, in light of the following:

- ANAs and adjudicators are paid a fee for their time
- as such, they have a vested pecuniary interest in having payment disputes referred to them, over other ANAs
- a reputation for using "claimant-friendly" adjudicators will more likely than not result in further referrals
- many ANAs have developed relationships with contractor organisations and actively promote their services to them.

The Committee submits that the BCIP Act should be amended to:

- remove an ANA's power to appoint adjudicators
- require a claimant to (in line with section 26(1) of the Western Australian Act) serve a payment claim:

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[2] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294.

[3] *R v Sussec Justices, Ex parte McCarthy* [1924] 1 KB 256.

[4] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 541.

[5] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504.

  - if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on that adjudicator
  - if the parties to the contract have appointed a prescribed appointer, on that appointer
  - otherwise, on a prescribed appointer chosen by the claimant
- require prescribed appointers to be independent bodies to avoid potential bias and ensure the independence of the adjudicator, in line with the objective of the BCIP Act.

Question 9 – Do you believe the timeframes for the making of and responding to claims under the BCIP Act are appropriate?

The Committee's submission on this point depends on the ultimate decision made in response to Question 1.

If the BCIP Act is amended in line with the Committee's response to Question 1 (i.e. to amend the BCIP Act to include a monetary threshold on payment claims), then the current 10 business day time frame within which a respondent has to respond to a payment claim is appropriate, having regard to the object of the BCIP Act to provide a rapid adjudication process. However, the Committee submits that even so, it would be fair to amend the BCIP Act so as to shorten the comparatively long period of time which is currently given to claimants to prepare and serve a payment claim (see section 17(4) of the BCIP Act).

If the BCIP is not amended in line with the Committee's response to Question 1, then the Committee submits that the current 10 business day time frame within which a respondent has to respond to the payment claim is manifestly unfair to respondents. This is particularly so:

- where the BCIP Act is used by large sophisticated contractors to make large (multi mullion dollar) and complex payment claims
- considering the harsh consequences of failing to provide a payment schedule within the 10 business day period (namely the respondent becoming automatically liable to pay the whole claimed amount to the claimant on the due date for payment irrespective of the validity of the payment claim).

If there is to be no monetary threshold on the application of the BCIP Act, the Committee would recommend an amendment to the BCIP Act which creates an extended adjudication process for large or complex claims. For claims over $1 million and for complex claims the respondent should automatically have a longer period of time to prepare a Payment Schedule (35 Business Days instead of the current 10 Business Days).

What amounts to a 'complex' claim would need to be defined. Complex claims would be those that by reason of the nature of the served material, require a greater amount of consideration and analysis by a respondent. For example, where a claim includes a certain quantity of information or the claim relates to certain matters, such as delays, acceleration, variation or breach of contract.

Allowing an extended adjudication process for large or complex claims would allow the BCIP Act to better self-regulate the types of claims that are made under the Act. There would be less incentive for contractors to use the legislation to "ambush" respondents where the time for submitting payment schedules was extended.

Whilst the creation of a more "flexible" adjudication system (instead of the current "one size" approach) has its benefits, the Committee is strongly of the view that the introduction of a monetary (or other type of) cap on BCIP Act claims is a more effective and simple way of ensuring the legislation is confined to smaller less complex payment disputes. The difficulty in developing an adjudication system that is flexible enough to deal with the larger claims is that effectively becomes de-facto arbitration. Furthermore, the system of appointment and supervision of registration of adjudicators is, in the Committee's view, not sufficiently robust to ensure confidence in the industry that adjudicators are uniformly suitable for determining multi-million dollar payment disputes involving complex matters of fact and law.

It has been suggested that rather than allowing an automatic extension of the adjudication process for large or complex claims, adjudicators might be given a discretion under the BCIP Act to grant an extension upon application by the respondent. This is problematic in the view of the Committee:

- adjudicators are appointed only after delivery of the payment schedule, and only where a claimant is not satisfied with the Respondent's reasons for withholding payment. They would need to be brought into the process well before there is the existence of any actual dispute if they are to make interim determinations on the timing of delivery of payment schedules
- any application by a respondent for an extension would in turn require a right of reply to be given to an claimant, in order to ensure procedural fairness. The whole process for the exchange of submissions on extension of time applications would need its own set of procedures
- it would lead to an intermediate class of court applications as adjudicator decisions on extension applications would inevitably be the subject of application for review in the Supreme court, leading to further uncertainty and delays.

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? If so, are changes necessary to address this and what should they be?

Yes. The BCIP Act permits (and our members of our Committee have had first-hand experience with) contractors 'ambushing' respondents by serving them with very large (i.e. multi-million dollar) and complex payment claims (i.e. accompanied with voluminous supporting material, including expert reports) in untimely and unfair manners.

The courts have generally held that there is no implied pre-condition to a valid payment claim, that the claimant has a bona fide belief in its entitlement, or that the claim is even made in good faith.[6]

The BCIP Act gives claimants the later of the period worked out under the contract or 12 months after the relevant construction work (or related goods and services) was last undertaken within which to prepare and serve a payment claim. In contrast, a respondent is only given 10 business days within which to review and respond to payment claims. These time frames apply regardless of the size or complexity of the claim. The process is therefore manifestly unjust and unfair as it permits the making of unreasonably large claims which take respondents by surprise.

[6] *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor* [2012] VSC 235.

The Committee submits that the following changes to the BCIP Act are necessary in order to properly address these issues:

- standardise the form of payment claim and require a payment claim to be served upon the contractually agreed person and at the contractually agreed location (see responses to Questions 2 and 7)
- expressly restrict payment claims to those under an agreed monetary threshold (see response to Question 1)
- expressly reduce the time frame within which a claimant must serve a payment claim to one month after the relevant work was last carried out.

These amendments would prevent a claimant from being able to make ambush claims against a respondent including by serving a claim:

- which is not clearly identified as a statutory payment claim
- at an unexpected location or to an unexpected person
- immediately before or after a holiday period or many months after the relevant construction work has been completed.

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

No. The Committee submits that to amend the BCIP Act in this way would be problematic as it would draw the principal directly into disputes between the head contractor and subcontractor. It would effectively freeze payments from the principal and it could be very disruptive and costly for construction projects.

It would also unfairly prejudice third party financiers whose loans might be subordinated to monies payable to the subcontractor. This would be contrary to the objective of the BCIP Act, particularly given that adjudication decisions under the BCIP Act are interim decisions only.

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

No. It is important to bear in mind the interim nature of BCIP Act determinations. The BCIP Act was never intended to override the parties rights to finally determine payment disputes in accordance with the agreed contractual framework, including the right to retentions. It would be inconsistent with this objective to amend the BCIP Act to try and do so. Retentions fall into the same category as security (see response to Question 6 above) and are a matter for commercial negotiation between the parties where it has been agreed that protection is required to ensure performance, including correction of defects, is properly completed.

Further, to require retained amounts be held by a third party would encourage disputes. Retentions are for the benefit and protection of the purchaser, who may not have any independent security to guarantee the contractor's performance.

The BCIP Act should not (in line with the policy of the Western Australian Act) unduly restrict the normal commercial operation of the building and construction industry.

Question 13: Do you believe some respondents are misusing the legal process by commencing Supreme Court proceedings to delay the payment of an adjudicated amount?

No. The Committee does not believe that respondents are misusing the legal process by commencing Supreme Court proceedings to delay the payment of an adjudicated amount. It is extremely difficult to bring an action against an adjudicator's determination in the Supreme Court. An adjudicator's decision is only reviewable on the grounds of jurisdictional error. The Discussion Paper itself notes the relatively small proportion (2%) of adjudication decisions that are reviewed in the Supreme Court. In light of that small proportion there does not appear to be a misuse of legal process.

The Supreme Court appeal process is also costly and time-consuming. It is not therefore an avenue which respondents typically favour (especially where the parties have contractually agreed to an alternative dispute resolution procedure). This is particularly so given that where a matter has been successfully appealed to the Supreme Court and decided in the respondent's favour, the result is that the matter is referred back to statutory adjudication where there is no guarantee of the new decision being in the respondents favour.

If so, what if any changes to the BCIP Act should be made to address this issue.

No further limitation should be introduced. There are already relatively narrow grounds for seeking a review of an adjudicator's decision. Those grounds importantly relate to the assurance of procedural fairness, the proper exercise of jurisdiction and observance of the "basic and essential requirements" of the BCIP Act. Removing the court's ability to oversee those functions would be to permit the most grievous errors by adjudicators, some of which might result in the adjudicator exceeding their jurisdiction.

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

Yes. The Committee submits that:

- there is currently a great deal of uncertainty in the construction industry as to which of the matters set out in section 26(2) of the BCIP Act will be essential for an adjudicator to consider in determining an adjudication application in order for a valid decision
- the definition of 'construction work' in section 10 of the BCIP Act is, as currently drafted, overly complex. This is causing confusion in the industry as to what it work and activities it is intended to cover. This confusion has in turn resulted in costs, delays and an increased dependency on legal advice.
- the jurisdiction of the BCIP Act, as provided in section 3(4), remains untested and unclear. It states:

  > *This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland.*

It is unclear whether the Queensland courts would form a view that related goods and services that are manufactured or produced overseas for use in a local construction project (which involves construction work being carried out in Queensland) would be captured by the BCIP Act. There are many reasons why such goods and services should not be subject to the BCIP Act.

Questions 15 and 16: Would you support the making void any unreasonable timeframes for notification of extension of time requests of variations within contracts?

No. The Committee submits that to permit an adjudicator to make determinations on the construction and enforceability of contractual notification requirements (such as extension of time requests or variations) would be inappropriate and contrary to the objectives of the BCIP Act.

Many adjudicators are ill-equipped (in terms of training, experience and available time) to make determinations on complex matters of construction. There are important reasons why time bars are negotiated and contractually imposed upon contractors. Prompt notification helps to minimise delays which, in turn, helps to deliver projects on time and within budget. Regular notification also encourages communication and healthy commercial and working relationships.

The importance of prompt reporting of delay claims has been recognised by the courts. For instance, in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)*[7] it was said that:

> *contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent.*[8]

Time bars also facilitate and promote the speedy and effective resolution of construction payments, which is one of the primary purposes of the BCIP Act.[9] Additionally, they generate certainty of outcome for both the principal and contractor and any financiers. Mandatory reporting of delay events preserves monetary certainty, particularly regarding the allocation of liquidated damages. This is not only for the benefit of the principal and their financiers. Professor Jones notes that timeframes when "*… properly and fairly applied, enable the contractor to claim in an orderly, timely and disciplined manner*".[10]

Any prescribed statutory time frames for notifications would not be flexible enough to cater to the unique commercial realties and time pressures of individual contracts. It would be unreasonable to impose a statutory minimum time frame for notification which applies equally to small simple projects and large complex projects.

The Committee further submits that it would also be a serious incursion upon the right of parties to contract freely. It would also impinge upon the jurisdiction of the courts and would also introduce a significant element of sovereign risk for investors.

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7 [2007] EWHC 447.

8 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 at [103].

9 See *Nebmas Pty Ltd v Sub Divide Pty Ltd* [2009] QSC 92 at [22] quoting Basten JA in *Co-Ordinated Construction Co v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229.

10 Doug Jones, "Can Prevention be Cured by Time Bars?" (2009) 26 ICLR 57, at 63.

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

Not applicable, for the reasons set out above.

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

No. The Committee submits that the BCIP Act should not be amended as proposed above. Permitting adjudicators to make determinations on the enforceability of termination for convenience clauses would be inappropriate and contrary to the objectives of the BCIP Act. It would also be a serious incursion upon the right of parties to contract freely and it would impinge upon the jurisdiction of the courts and would introduce a significant element of sovereign risk for investors. In the view of the Committee, many investors on projects would not accept a contract that did not have a clear termination for convenience regime.

Termination for convenience clauses are a commonly agreed between the parties to allow a principal to cease the work under the contract for circumstances other than a breach of contract. There are a variety of reasons why this right may need to be exercised including the loss of financial backing, changed regulatory or other investment conditions. Most often those clauses have an agreed compensation regime.

There is a significant body of case law around termination for convenience. Given that there are often significant multi-layered contractual and financial arrangements that relate to the right of termination for convenience, the Committee submits that it is not appropriate for adjudicators to interfere with the exercise of these rights.

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?

No. Most termination for convenience clauses will have an agreed compensation regime. Parties should be free to exclude consequential loss, of which lost profits is usually a principal component.

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 the BCIP Act?

No. The Committee submits that the BCIP Act does not need to be amended as proposed above. The BCIP Act already includes, in section 99, a broad ‘no contracting out’ provision.

This Question 18 assumes that preconditions to payment in construction contracts are designed to restrict the application of the BCIP Act. This is not the case. There are important reasons why payment conditions are negotiated and contractually agreed by the parties. Payment conditions help to ensure that subcontractors are actually being paid (which is directly consistent with the objective of the BCIP Act). They also facilitate prompt and accurate payment by requiring accounting books and records are up to date and granting ongoing auditing rights.

On the contrary, the Committee submits that the following changes to the BCIP Act are necessary in order to properly preserve the payment conditions and to ensure that the BCIP Act does not unfairly restrict the normal commercial operation of the building and construction industry:

- clarify that the 'reference date' is conditional upon compliance with all of the contractual pre-conditions for payment (see response to Question 19)
- mandate a standard form of payment claim and require payment claims to be served upon the contractually agreed person and at the contractually agreed location (see responses to Questions 2 and 7)
- provide for longer time frames within which a respondent can respond to large or complex claims and require parties to comply with the agreed contractual dispute resolution procedure prior to initiating statutory adjudication (see response to Question 9).

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?**

The current approach in section 99 of the BCIP Act is appropriate.

- **Do you believe adjudicators should be given the statutory power to declare such contractual provisions void?**

No.

Question 19: Do you have any concerns about a legislative amendment being made to the BCIPA 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?

No. The Committee submits that this is an important safeguard for principals and is a legitimate way of mitigating the risk to a principal of paying a head contractor on account of claimed subcontracted labour or materials if the subcontracted labour or materials have not in turn been paid for by the head contractor.

Moreover, the Committee submits that the obligation to provide a statutory declaration is in line with the policy objective of the BCIP Act to help ensure that subcontractors are being paid for the work that they perform.