

15 business days: respond or pay in full under WA building contracts

By Peter Wittkuhn

The Building and Construction Industry (Security Payment) Act 2021 (BCISoP Act), which commenced on 1 August 2022, is now an entrenched part of the legal landscape regulating the Western Australian building and construction industry. Local governments, as principals under building contracts, need to be familiar with, and comply with, the requirements of the BCISoP Act. This article explains the operation of the provisions which are of most critical significance on a day-to-day basis, namely the provisions concerning 'payment claims' and 'payment schedules'. The BCISoP Act has taken over in most respects, from the *Construction Contracts Act 2004 (2004 Act)* though the latter continues to regulate pre-01.08.22 building contracts.

For the most part, a builder's rights as against the principal under the BCISoP Act are mirrored in equivalent rights applicable on the part of the sub-contractor vis-à-vis a head contractor, with some variations. For the purposes of this article, reference will only be made to a 'builder' and a 'principal'.

Progress claims are called 'payment claims'

Builders' progress claims are called 'payment claims' under the BCISoP Act: section 22. Progress claims may be made on or after the last day of a calendar month: section 23(2). Only one payment claim per calendar month can be made, unless the contract provides for a greater frequency: section 23(7). Also, if the contract expressly allows payment claims to be made on or after an earlier date of the calendar month, then a payment claim may be made on or after that earlier date: section 22(3)(b).

A payment claim must be in writing and must state that it is made under the BCISoP Act: section 24(1)(d). Other formalities are set out in section 24(1). Non-compliance with these formalities will mean that the payment claim is 'only' a claim brought solely pursuant to the building contract (if such a claim is permitted under the contract) without the added benefit of the statutory rights conferred by the BCISoP Act.

There is nothing to prevent a builder from issuing a payment claim in the form of a tax invoice, provided it otherwise complies with s. 24(1).

Principal's response is called 'payment schedule'

It is important that the principal responds within 15 business days of receipt of the payment claim – or a shorter time if the contract expressly provides for a shorter time: section 25(1). Where the principal has engaged a superintendent, it will normally be the superintendent's response (conventionally referred to as a payment certificate) which will be considered to be the principal's response.

The principal's (or superintendent's) response is called a 'payment schedule' under the BCISoP Act: section 25(1). The formal requirements of a principal's payment schedule are set out in section 25(2) and (3):

'(2) A payment schedule must —

(a) be given in writing and be in the approved form (if any [there is currently none, though a DMIRS guidelines template is available]); and

(b) identify the payment claim to which it relates; and

(c) indicate the amount of the payment (if any) that the [principal] proposes to make (the scheduled amount); and

(d) if the [principal] does not propose to make any payment — indicate that the [principal] does not propose to make any payment.

(3) If the scheduled amount is less than the claimed amount or no payment is proposed, the payment schedule must indicate —

(a) why the scheduled amount is less or no payment is proposed; and

(b) if the reason is that the [principal] is withholding payment — the reason why the [principal] is withholding payment.'

If the principal or its superintendent does not respond within 15 business days, then the full amount of the builder's payment claim is deemed to be payable: section 26.

The due date for a principal to pay a progress payment is 20 business days after a payment claim is made: section 20(1)(a). The section prevails over any provision of the contract that provides for a longer period. However, if the contract expressly provides for an earlier due date, then the contract prevails: section 20(2). If the principal does not pay on or before the due date for payment, the claimant may:

- sue for recovery in a court of competent jurisdiction; or
- make an adjudication claim under the BCISoP Act – referred to in this article as a '**rapid adjudication claim**': section 27(2).

Suing in a court of competent jurisdiction

The overall scheme of the relevant section, section 27, of the BCISoP Act is that:

- the contractor generally obtains a straightforward judgment for the amount that the principal or superintendent certified – ie, the amount acknowledged in the 'payment schedule' (referred to in the BCISoP Act as the 'scheduled amount') – that is in cases where there *was* a timely payment schedule: section 27(3)(a) and (4)(ii);
- the contractor will *not* be able to obtain judgment for *more* than what the principal or the superintendent certified as being properly payable;
- if the principal or its superintendent failed to give a timely payment schedule, then the contractor will generally be

- able to obtain judgment for the whole amount of the payment claim: section 27(3)(a) and (4)(i); and
- the principal cannot raise a defence or cross-claim to the contractor's claim, because all available defences and cross-claims are deemed to have been taken into account when the principal or its superintendent issued the payment schedule. (Or if they failed to issue a payment schedule in time, they should be stuck with that consequence: section 27(3)(b)).

A judgment under section 27 of the BCISoP will be referred to in this article as a '**section 24 summary judgment**' although that description is not necessarily completely accurate in all cases.

Rapid adjudication

If the builder chooses rapid adjudication, then before instituting this process, the builder must give one more opportunity to the principal to issue a payment schedule, in cases where the principal failed to issue one. This opportunity must be given before 20 business days have expired since the payment fell due: section 28(2)(a). The opportunity which is to be given must take the form of informing the principal in writing of the builder's intention to apply for rapid adjudication; and calling on the principal to give a payment schedule within 5 business days: section 28(2).

If a payment schedule is given within those five business days, then a 20-business-day time limit commences for the builder to commence rapid adjudication.

If no payment schedule is given within five business days, then upon the expiration of five business days, the 20-business-day time limit begins to run within which the builder must commence rapid adjudication: section 28(4).

It remains the case, as under the 2004 Act, that:

- Adjudicators are appointed by certain organisations statutorily approved for that purpose – the public court system is not invoked;
- Rapid adjudication proceedings are determined at breakneck speed, and nearly always wholly on the papers. A principal's failure to respond according to the strict time limits means that any late response must not be taken into account: section 38(3)(a).

A critical provision of the BCISoP Act which was not in the 2004 Act, is that a principal is not permitted to lodge a response (in effect, a defence) to a rapid adjudication claim unless the principal gave a time-compliant payment schedule in response to the builder's original payment claim: section 34(1). Furthermore, even if a principal did give a payment schedule on time, the principal cannot rely on a ground of defence in the rapid adjudication, if that ground was not included in the payment schedule: section 34(3). These two points underscore the pivotal role of payment schedules, and the imperative to issue them within time.

The provisional nature of payment schedules, suing under section 27, or pursuing rapid adjudication

Rapid adjudications, and section 27 summary judgements are, in a sense, provisional only. This proposition requires some further explanation.

Let us suppose that a principal fails to give a timely payment schedule; or their superintendent allows a higher payment

than the principal thinks reasonable. It will usually be possible, ultimately, for the principal to pursue arbitration or court proceedings (**civil proceedings** – the type depends on the dispute resolution mechanism provided for by the contract, if any) to vindicate the position that the principal genuinely contends should apply. This outcome will depend on the terms of the contract and all the relevant circumstances of the payment dispute. The fact that the principal may have been obliged in the meantime to make payment – in accordance with a payment claim, a payment schedule, a rapid adjudication or a section 27 summary judgement – is ultimately capable of being trumped by a fully-litigated arbitration or court proceeding which arrives at a different result.

Conversely, where a contractor genuinely believes they are entitled to more than was certified in their favour in a payment schedule, the contractor can pursue civil proceedings to vindicate the contractor's position.

In this sense, a rapid adjudication or a section 24 summary judgment is provisional. However, until and unless civil proceedings are pursued and determined, a rapid adjudication or a section 24 summary judgment will bind both parties.

The Explanatory Memorandum, in describing what is now section 55 of the BCISoP Act, summarises the position by saying that the part of the BCISoP Act which establishes payment claims, payment schedules, rapid adjudication and section 27 summary judgments *'is a "pay now, argue later" scheme that does not limit the final entitlements that a person may have under a construction contract or any other remedy that a person may have for recovering that other entitlement'*.

Conclusion

The BCISoP Act further strengthens the protection of contractors under building contracts, consolidating the foundation established by the 2004 Act. Among the most significant provisions that local governments must be aware of as principals, are those dealing with the making of progress claims (payment claims), and responding to payment claims. Particular attention must be given to ensuring a timely and thorough response to payment claims, otherwise the full amount of a payment claim be deemed payable, a position that can then only be reversed or varied by full-scale dispute procedures such as arbitration or court proceedings.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Peter Wittkuhn by telephone on 08 9383 3133 or by email pwittkuhn@mcleods.com.au.

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