BCIPA reform: What you need to know

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The 306-page Report followed a comprehensive consultation process (including 128 written submissions and 86 interviews), and after ten months deliberation in Cabinet, it has been released in full today (see here).

The Wallace Report consciously adopts an ‘if it ain’t broke, don’t fix it’ approach, and may accordingly be seen as advocating renovation of the ten-year old Building and Construction Industry Payments Act (BCIPA), rather than tearing it down to rebuild from scratch.

In doing so, it closely reflects the cautious approach taken to updating the New South Wales Act, and rejects a range of measures adopted in Victoria and Western Australia.

While it is important to remember that the recommendations (which include draft clauses) are yet to be released in bill form, the Report nonetheless provides a good indication of what can be expected.

What will stay the same?

In a number of fundamental respects, the Wallace Report rejects calls for sweeping change from various industry segments, and endeavours to preserve parties’ freedom of contract as far as practicable (and consistent with the Act’s objects), including recommendations that:

■ the scope of construction work covered by the Act stays the same, and in particular, the push to significantly broaden the mining carve-out to mirror the WA legislation is rejected;
■ no cap is imposed on the value of either construction contracts or payment claims covered by BCIPA (although the modified process below provides special rules for large claims);
■ no mechanism is proposed for an adjudicator to award money claimed to be owing ‘up the chain’ where set-off amounts in a payment schedule exceed the amount of the payment claim (ie, from subcontractor to head contractor, or from head contractor to principal);
■ the formal requirements for payment claims, such as endorsing the name of the Act, and service requirements, stay the same; and
■ the proposal to imply terms into construction contracts creating minimum periods for time bars on extension of time or variation claims is rejected;
■ the proposal to invalidate termination for convenience clauses, or govern the amount payable on termination, is rejected;
■ contractual preconditions to payment, such as statutory declarations, are left to the parties to negotiate, and neither prohibited nor made mandatory.
What is going to change?

The Cabinet has already endorsed a number of the recommendations made by the Wallace Report, and identified key areas for legislative reform in late 2014.

Claim and adjudication process

While the fundamentals of the BCIPA process will remain unchanged, a number of changes are proposed, which address common complaints made by respondents to the process but also assist claimants in some regards:

- The period in which claims can be made after work stops is reduced from 12 months to 6 months (unless the contract provides for a longer period);
- However, a claim for a final progress payment, (potentially including claims for the release of retentions and securities, see below), may be made within 28 days of the expiry of the defects liability period (unless the contract provides for a longer period);
- In a big win for principals and head contractors, the time for lodging adjudication responses is extended by a full week, to 10 business days from receipt of an application (and even longer for large claims);
- Equally significantly, a respondent will be able to raise matters in an adjudication response that weren’t in the payment schedule, with the claimant receiving a right of reply; and
- ‘Ambush’ claims during the Christmas period have been reined in, with the period in which time does not run being extended to three business days before Christmas Day, and 10 business days after New Year’s Day.

Adjudicators and ANAs

This is another area where significant reform has been endorsed, to address the perception amongst users of the BCIPA process of conflicts of interest in the current arrangements, as well as a need to match adjudicators’ experience and knowledge levels to the work that they are assigned:

- Authorised Nominating Authorities (ANAs) are to be abolished, and the Adjudication Registry (within the Queensland Building and Construction Commission) will be in charge of allocating applications to adjudicators of appropriate skill level, and otherwise providing support;
- The knowledge requirements for registration as an adjudicator will be increased, and they will be required to undertake Continuing Professional Development activities.

New process for large claims

Although rejecting a cap on the value of claims for which BCIPA is available, the Wallace Report also proposes a modified process for large claims, as opposed to the current ‘one size fits all’ approach.

For claims exceeding $750,000 (or involving complex issues, namely latent conditions and time-related claims), a separate process within BCIPA will apply, with the intention of according fairness to respondents who were previously forced to reply in very short timeframes to complex and detailed final claims that may have taken months to prepare:

- The time to provide a payment schedule will be increased to 15 business days, and 30 business days where the claim is served more than three months after the final reference date;
- The time for an adjudication response is extended by another week on top of the periods stated above, and the respondent can seek the adjudicator’s approval to take up to 15 additional business days; and
- The adjudicator will have 15 business days to make a decision.
BCIPA reform: What you need to know (cont.)

Further potential reforms

A number of other recommendations are of interest, and although they do not form part of the initial package of reforms, Cabinet has not ruled out addressing these proposals at a future date.

Retentions and securities

Significant reforms are proposed by the Wallace Report in the area of retentions and securities, which are claimant-friendly and will be welcome to many subcontractors, especially:

- retention amounts and securities should not be held by parties to a contract, but rather deposited under a Construction Retention Bond Scheme, to be administered by the Queensland Building and Construction Commission;
- payment claims and adjudication applications can include claims for the release of retention amounts and the return of securities; and
- failure to return a security when required by the contract will be an offence, as will failing to inform the contracted party that a milestone relevant to a security has been reached.

In this regard, Cabinet has decided to take a ‘wait and see’ approach in relation to parallel reforms in NSW; however, industry participants should anticipate movement in the near future.

Jurisdiction of the Supreme Court

While rejecting the introduction of legislative provisions governing the process for invoking the supervisory jurisdiction of the Supreme Court, the Wallace Report also recommends:

- empowering the Court to ‘sever’ a part of an adjudication decision affected by jurisdictional error and uphold the remainder, effectively overturning the recent Court of Appeal decision in BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2013] QCA 394 and restoring the trial judge’s approach (see our previous update here); and
- adjudicators will not be denied their fees if a good faith adjudication is overturned by the Court for jurisdictional error.

Regulation of adjudicators

In addition to the reforms identified above, the Report recommends:

- active adjudicators will need to inform the registry within a day of any engagement in their professional capacity which may provide a conflict of interest with their work as an adjudicator in relation to a particular matter;
- adjudication fees to be standardised and prescribed by regulation; and
- adjudicators whose decisions are invalidated by a Court for jurisdictional error or lack of good faith must notify the Registry, and risk cancellation of their registration for multiple occurrences.

Finally, it is recommended that an entirely separate ‘rapid domestic adjudication’ scheme be introduced, rather than bringing domestic building under the aegis of BCIPA. Any movement on this front will accordingly fall outside the BCIPA reform process.
What happens next?

Notwithstanding the detailed consultation and the Wallace Report’s attempts to fine-tune the balance between claimants and respondents, the Report will inevitably provoke a strong reaction, especially from the mining industry, the ANAs, and potentially also the adjudicators themselves.

While Cabinet has approved the recommendations, the amendment bill has not been debated in Parliament (or even introduced). However, the Department of Housing and Public Works has foreshadowed a 1 September 2014 commencement date, with all contracts entered into after that date to be affected by the new legislation, but contracts on foot to remain governed by the existing provisions.

Staying on top of the amendments will be essential, especially for parties tendering before 1 September 2014 for contracts that are likely to be entered into after that date.

The author, Eden Bird, assisted Andrew Wallace in producing the Report. Our Construction and Infrastructure team look forward to assisting with your enquiries.

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