

A practical guide to the
*Building and Construction
Industry Payments Act*



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About the BCIPA

The Building and Construction Industry Payments Act 2004 (BCIPA) is designed to provide a quick dispute resolution process for people carrying out construction work or supply related goods and services under a construction contract.

The Act protects people's cash flow by increasing the frequency and reliability of progress payments.

The BCIPA outlines a procedure for parties to resolve payments themselves before unpaid parties take the matter to an adjudicator.

These steps include:

- The claimant (the person/company that did the work) makes a payment claim
- The respondent (the party responsible to pay under the contract) pays the claim or provides a payment schedule in response if they wish to dispute the claim
- Any disputed claim is referred to an adjudicator
- The adjudicator decides what amount of money, if any, is owed to the claimant.

This checklist aims to provide members of the building and construction industry with a practical guide to the applicability of the Act, the adjudication process and what to do in common situations.

Applicability of the Act

Who can make claims under the BCIPA

The following occupations can use the BCIPA:

- Contractors and developers
- Sub-contractors and contractors
- Suppliers and sub-contractors and contractors
- Consultants
- Plant and equipment hirers
- Owner builders.

What can be claimed

The BCIPA applies to all construction contracts or arrangements entered into on or after 1 October 2004. This includes verbal agreements and arrangements.

The BCIPA covers all construction work or the supply of related goods and services under a construction contract including:

- The supply of materials that will form part of the building structure, materials or plants sold or hired
- Labour hire
- Consultant services such as architecture, design, quantity surveying, soil testing and engineering
- Building work
- Electrical
- Landscaping
- Demolition
- Cleaning services.

The Act does not apply to:

- Domestic building contracts between a contractor and an individual resident owner
- Where a sub-contractor has already given notice of a sub-contractors charge.

Making a payment claim

If a claimant has not received payment, their first step is to send the respondent a written payment claim.

Claimants must provide as much information as possible in the initial payment claim, because points not raised cannot be considered at a later date by an adjudicator.

The written claim must:

- Be addressed and delivered to the respondent specified in the contract
- Identify the construction work or related goods and services to which the claim relates
- State the amount of the progress payment due
- Contain a paragraph that states: 'This is a payment claim made under the *Building and Construction Industry Payments Act 2004*'.

When a payment claim can be made

This claim can be made:

- In accordance with each 'reference date' in the construction contract
- If there is no time period in the contract, on the last day of the month that the construction work was first carried out or related goods and services were supplied, and the last day of each latter named month
- Any time within 12 months after the work was carried out or the goods/services were supplied regardless of the contract.

Only one claim can be made for each reference date (payment period under contract or per month), but claimants can include amounts from earlier claims in a payment claim.

Payment of claim

When respondents receive the payment claim they may either pay the claim in full or respond by serving a payment schedule within 10 business days after the claim is served.

If they pay the claim in full, this is to be paid within the time stated in the contract or if not stated, within 10 business days.

Payment agreements are void when:

- Any payment agreement in a construction trade contract or sub-contract allows for a payment of a claim later than 25 business days
- Any payment agreement in a commercial building contract allows for payment of the claim later than 15 business days after the set date.

Payment schedule

If respondents choose to serve the claimant with a written payment schedule, this must:

- Identify the payment claim to which it responds
- Indicate the amount proposed to be paid
- If the amount proposed to be paid is less than the amount claimed, clearly state reasons why it is less.

The content of the payment schedule should provide comprehensive details responding to the claim, as any new information not in the schedule cannot be brought up in an adjudication. This includes reasons why the respondent may be withholding any payment.

A respondent's cross claim for damages for delay of delivery is unlikely to be successful unless specific contractual provisions are applicable. Cross claims may succeed if there has been faulty or incomplete work.

If no payment schedule is delivered within the time specified, the respondent must pay the full amount of the claim.

If the claim is not paid, the BCIPA enables claimants to:

- Suspend future work within two business days notice
- Elect to proceed with an adjudication
- Take the matter to court to recover the amount as a debt (if no payment schedule is provided), stopping the respondent from disputing the claim or making a cross claim.

Adjudication

There are three paths to the adjudication process.

Payment schedule is less than claimed amount

If the respondent's payment schedule is less than the claimed amount, the claimant will need to:

- Make a written adjudication application to an authorised nominated authority
- Submit this application within 10 business days after receiving the payment schedule, or notice that payment cannot be made
- Serve the respondent with the adjudication application.

Payment schedule is wholly or partly unpaid

If a respondent serves a payment schedule on a claimant, but the amount is wholly or partly unpaid by the due date for payment, the claimant can:

- Make a written adjudication application to an authorised nominated authority, ensuring it does not include any new issues not included in the initial claim
- Submit this application within 20 business days after the due date for payment.

No payment schedule and claim not paid by due date

If a respondent does not provide the claimant with a payment schedule and does not pay any part of the claimed amount by the due date, the claimant must:

- Give the respondent written notice within 20 business days after the due date of its intention to apply for adjudication of the payment claim. This notice must include specific notification that: "the respondent may serve a payment schedule on the claimant within five business days after receiving the claimants notice"
- After the five day period, make a written adjudication application to the authorised nominated authority within 10 business days
- Provide the respondent with a copy of the adjudication application.

Adjudication responses

A respondent can respond to the adjudicator and the claimant within five business days after receiving the adjudication application or two business days after receiving a notice of the adjudicator's acceptance of the application, whichever is the later.

The respondent must:

- Exclude any new reasons for withholding payment that have not been included in the payment schedule
- Send a payment schedule to the claimant within the required time frame before providing a response
- Deliver a copy of the response to the claimant.

Adjudication procedures

The adjudicator must provide a decision within 10 business days after the date that they receive a response from the respondent, or should have received a response.

The adjudicator can grant an extension of this time if all parties agree. If the parties don't agree, and the adjudicator makes a decision after 10 business days, the decision is defective and would be invalid.

An adjudicator can:

- Ask for further written submissions
- Set deadlines
- Call a conference
- Carry out an inspection.

An adjudicator can only take into account:

- The BCIPA and the relevant provisions of the *Queensland Building Services Authority Act*
- Conditions of the construction contract
- Payment claim and any submissions raised in the claim
- The payment schedule and any submissions raised in the schedule
- The result of an inspection.

The adjudicator's decision is published on the Building and Construction Industry Payment Agency website at www.bcipa.qld.gov.au.

Resources

Useful websites for further information on the BCIPA and a list of authorised adjudicators include:

- Building and Construction Industry Payment Agency www.bcipa.qld.gov.au
- Adjudicate Today Pty Ltd www.adjudicate.com.au
- Australian Solutions Senate Pty Ltd www.solutionscentre.com.au
- Institute of Arbitrators and Mediators Australia www.iama.org.au
- Leadr www.leadr.com.au
- Queensland Law Society www.qls.com.au
- RICS Australasia Pty Ltd www.ricsdrs.com.au

Finality of decisions

The intent of the BCIPA is that the adjudicator's decision is meant to be final to enable prompt resolution of account disputes. Any payment of an account claimed under the BCIPA does not stop either party from taking a full dispute before a court.

While there are limited opportunities to challenge the adjudicator's decision, the BCIPA is an evolving piece of legislation and there have been various cases that have successfully overturned decisions.

Macrossans Lawyers keeps abreast with these changes and will provide alerts to keep you updated.

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Disclaimer: The checklist aims to answer the simple questions you may have, however it is not meant to replace legal advice as the legislation can be technical and there is likely to be alterations in the early stages.

A member of the **hunt&hunt** legal group