



Welcome to Carter Newell's BCIPA Notes. In this edition we briefly comment on the developments of the Queensland Building Services Board review of the *Building and Construction Industry Payments Act 2004* (Qld), and take a brief look at some of the developments in Queensland over the recent months.

### Industry awaits outcome of BCIPA review

*Luke Preston, Special Counsel*

Six years on since its enactment, the building and construction industry in Queensland now looks forward to the outcome of Queensland Building Services Authority's review of the *Building and Construction Industry Payments Act 2004* (Qld), which was first announced in 2009.

After considering the Act's effectiveness and identifying relevant industry issues, the Queensland Building Services Board issued a discussion paper in August 2010 for public comment.

The discussion paper flagged several possible areas for the future amendment of the Act, including:

- Whether changes are required to mitigate unfairness arising from "ambush" payment claims;
- Making provision in s 26 to require an adjudicator to expressly decide the issue of jurisdiction; and
- Whether some special form of adjudication process should be extended to domestic building contracts.

Formal submissions have been made by a variety of industry stakeholders including Queensland Master Builders Association, Housing Industry Association, Queensland Law Society and a number of Authorised Nominating Authorities and Adjudicators.

Submissions closed on 4 October 2010, and the Government's response is now eagerly awaited.

Copies of the submissions made in response to the discussion paper are available at [www.bsa.qld.gov.au/DiscussionPaperPublicList.aspx](http://www.bsa.qld.gov.au/DiscussionPaperPublicList.aspx).

We will keep you advised of any developments and provide you with a further update once the Board releases its findings.

*Carter Newell provides reliable, timely and commercial solutions to all claims and disputes arising under BCIPA. For further information or assistance on any BCIPA matter including the preparation of payment claims, payments schedules or applying for or responding to an adjudication, contact one of our experienced team members listed overleaf.*



## Tide and Time

John Grant, Special Counsel

The recent spate of natural disasters in Queensland and other places interrupted the ordinary operations in the construction industry, including the administration of payment claims not only under construction contracts, but also under the *Building & Construction Industry Payment Act 2004* (Qld) (Payments Act).

Sometimes in such circumstances, parties are prepared to allow each other some leeway when interruption to business means that time limits for the giving of notices or the making of claims in contracts are not or cannot be met. Ordinarily, under a contract, the parties may simply agree that strict compliance with the terms of the contract might be waived in the particular circumstances.

The situation is not so easily dealt with under the Payments Act. The strict time limits placed on both the claimant and on the respondent for various steps under the Act cannot be changed by either party - no matter the circumstances - even if there is agreement that an extension of time should be allowed. Further, an adjudicator has no power under the Payments Act to 'cure' any non-compliance by either party - even if agreed - no matter how compelling the circumstances. Nor is there any power in a court to extend time limits under the Payments Act.

Not being aware of these limitations, parties might unknowingly make agreements that actually result either in the loss of:

- the right to commence or pursue a payment claim or subsequent remedies under the Payments Act (in the case of a claimant); or
- the ability properly to defend a payment claim by way of schedule or adjudication response (in the case of a respondent).

This does not mean that the person apparently giving the indulgence can turn around and take advantage of the strict provisions of the Payments Act after all when the other party has acted on that indulgence to its detriment.

Such conduct might well be impugned under s 52 of the *Australian Competition and Consumer Law* (formerly the *Trade Practices Act 1974* (Cth)) or on the basis of an estoppel and may well found, not only an action for such damages that might be proven, but also in the shorter term declaratory or injunctive relief to ameliorate the impact of relying on the promise that could not be fulfilled.

Even well-meaning attempts in difficult or unusual circumstances to manage claims and disputes between parties may, in fact, only serve to complicate any matters in issue between them. Ideally, legal advice should be obtained before such agreements are sought or obtained. If that is not possible, given the complexities that can arise in process under the Payments Act, legal advice should be sought either to attempt to preserve the process in accordance with the spirit of any agreement or to minimise the detriment suffered (as the case may be).

**David Rodighiero**  
Partner  
Registered Adjudicator



T (07) 3000 8376  
E [djr@carternewell.com](mailto:djr@carternewell.com)

**Patrick Mead**  
Partner  
Registered Adjudicator



T (07) 3000 8353  
E [pmead@carternewell.com](mailto:pmead@carternewell.com)

**John Grant**  
Special Counsel  
Registered Adjudicator



T (07) 3000 8311  
E [jgrant@carternewell.com](mailto:jgrant@carternewell.com)

**Luke Preston**  
Special Counsel  
Qualified Adjudicator



T (07) 3000 8384  
E [lpreston@carternewell.com](mailto:lpreston@carternewell.com)

**John Matthews**  
Associate  
Qualified Adjudicator



T (07) 3000 8344  
E [jmatthews@carternewell.com](mailto:jmatthews@carternewell.com)

To tell us what you think of this newsletter, or to have your contact details updated or removed from the mailing list, please contact the editor at [privacy@carternewell.com](mailto:privacy@carternewell.com)

If you would like to receive our newsletter electronically please go to [www.carternewell.com](http://www.carternewell.com) and enter your details in CN|Newsletter signup.

*The material contained in this publication is in the nature of general content only, and neither purports nor is intended, to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering and, if necessary, taking appropriate professional advice upon his or her own particular circumstances.*



**For further information, contact Carter Newell Lawyers**

### Brisbane

Level 13, 215 Adelaide Street  
Brisbane QLD Australia 4000

Phone +61 7 3000 8300  
Email [cn@carternewell.com](mailto:cn@carternewell.com)

### Sydney

Level 6, 60 Pitt Street  
Sydney NSW Australia 2000

Phone +61 2 9241 6808

### Melbourne

469 LaTrobe Terrace  
Melbourne VIC Australia 3000  
(Via Agency)

[www.carternewell.com](http://www.carternewell.com)