



BCIPA Update

While it had a slow start, the Building and Construction Industry Payments Act 2004 (BCIPA) has become entrenched in the Industry, going from a term added blindly to the bottom of invoices, to a piece of legislation that is largely achieving its goal of freeing up the payment system and ensuring timely cash flows. However, there are concerns that it may have gone too far.

The increased adoption of the Act and the current uncertainty in the industry are reflected in a 37.5% increase in Adjudication applications (as compared to the same period last year). Importantly, demographic change is also taking place with substantial increases in applications from regional areas such as

Rockhampton, Mackay and Townsville; and a five-fold increase in applications where Head Contractors are the respondents.

While opponents of the Act feel that it is too 'claimant focussed', on average only 41% of claimants receive their full claim amount. However, with small claims (< \$40K) achieving their full claim 65% of the time and larger claimants (>\$40K) only 16.5%, some respondents have concerns that larger or more organised claimants are 'padding' or making 'vexatious claims', and using BCIPA as a non-payment dispute resolution tool.

Currently 50% of BCIPA applications for adjudication are claims under Section 21(1)(a)(i and ii) which together amount to a failure of the respondent to lodge a complete payment schedule. In these cases the Adjudicator has little option but to find for the claimant. So perhaps of greater concern are claims of 'gaming' where time periods are purposely made difficult for the respondent; and 'collusion' where a number of claimants lodge large detailed claims at the same time – with the impact of hindering the ability of the respondent to react effectively.

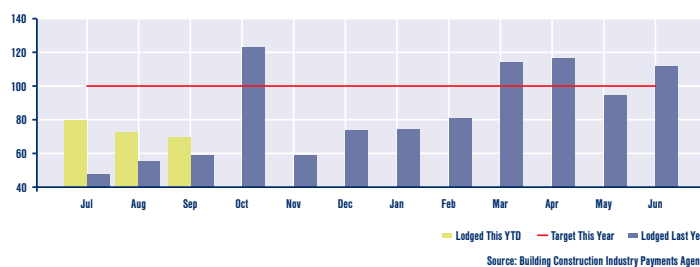
While some are calling it the 'ATM' act, be warned that there is recourse to an adjudication decision in the Supreme Court. While this is time consuming and costly, respondents that find the results of adjudication unfair, contractually incorrect, or

unjust are taking this route, and instead of an easy pay day claimants can find that they are in for a long and expensive defence with the spectre of damages and costs hanging over their heads.

Whether or not these issues are because of a minority abusing the Act; the time frames for response being too tight; low accountability for vexatious claims; or a simple lack of understanding of the ramifications of inaction – the fact remains that the Act is here and it is here to stay.

Whether you are a Developer, a Contractor, or a Subcontractor, you need to have a system in place to handle claims, and if you receive an invoice with the tag 'this is a claim under the Building and Construction Industry Payments Act 2004' then you should take it seriously and make an appropriate response under the Act.

Applications Lodged This vs Last Financial Year



Advice for Respondents

1. Monitor instructions, programme, variations, EOT's & claims proactively. Keep impeccable records to ensure a timely response to a claim.
2. Resolve cost claims in a timely manner. If there is no agreement, start dispute resolution as soon as possible rather than letting issues build up.
3. When approaching Practical Completion, also identify defects and liquidated damages
4. Display empathy. Do not just say no to everything. If the answer is 'maybe', then explain what is required to get to 'yes'.
5. Re-think your stance on the timing of issuing Practical Completion – holding off for 2 months can end up providing 2 extra reference dates for potential claims.
6. If you are unsure, seek advice from someone who knows – early on in the process.

The material in this bulletin is for general comment only. For further information contact **David Mitchell** on **07 3327 5000**. If you would prefer to receive our bulletin via email, or do not wish to receive our information in future, please email **Lisa Veneran**, Marketing Manager at **lveneran@mitbrand.com**



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