



The Rotary Club of Brisbane Inc.

Founded 29 May 1923 Club 17787

A global network of community volunteers

15 July 2013



The Rotary Club of Brisbane Inc.

GPO Box 2909
Brisbane Qld 4001

Meets 4th Floor
(Edinburgh Room)
of the Brisbane Club
Post Office Square
241 Adelaide Street
Brisbane

MONDAYS

12.15 pm – 1.45 pm

OFFICERS

President	Graeme Whitmore
President Elect	Graeme Whitmore
Imm Past President	Alistair Smith
Vice President	Keith Watts
Secretary	Michael Stephens
Treasurer	Dougal Henderson
Sergeant-at-Arms	Cameron Bishop

District 9600
Club Number 17787
Founded 29 May 1923

District Governor
Dai Mason

Rotary International President
Sakuji Tanaka

President's Message

Greetings Fellow Rotarians and Friends & Visitors

This is my second "President's Message" for the new Rotary year, and I trust, for members not in attendance today, may it find you in good health and full of good intentions for next week.

I thank all our members for their attendance today, and a special renewed welcome to visiting Rotarian Denise Schellbach who has been a regular visiting Rotarian over a long period.

Our own member Dinah Zhang was our speaker today and a very interesting run down on the legal nuances of contractual payment processes and security of payment. It is pleasing to see the wealth of knowledge available from within our club membership.

Our numbers were a bit low for the day, and as a result I personally appeal to all members to become regular attendees, and bring along the potential new member that I have previously referred too. "Many hands make light work".

The club has received a note of thanks from AD Lisa Bateson following our 90th Birthday, and a congratulation letter from our Sister Club, the Rotary club of KOBE EAST.

In addition to congratulating us for our 90th Birthday, President Akinori Nakai referred to our sister relationship with respect to our Club acting as intermediary between Kobe East and Our District during our Flood Relief Activities, and their sincere thanks for our generous aid during the "Great East Japan Earthquake"

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What's On?
15 July:
Fellowship

4 WAY TEST

Of the things we think, say or do:

1. Is it the TRUTH?
2. Is it FAIR to all concerned?
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?





President's Message - continued

Kobe East apologized for not being able to attend our birthday function, but have extended a warm invitation for our club to be in attendance for their 60th Anniversary on 8th April, 2014.

This invitation is in close proximity to Taipei Tatung celebrations on 10th April 2013.

It was suggested that a trip could be arranged for the Hong Kong Sevens Rugby, late March 2014 followed by Kobe East and then onto Taipei Tatung. Any Interest????

I advise that there is "Grants Management Seminar" scheduled for a half day on 14 July, and to participate in Rotary Foundation District, Global & Packaged grants, each club must agree to implement the financial & stewardship requirements of a MOU provided by the the Rotary Foundation.

Please advise if any member wishes to attend this Seminar to represent the Club

Early advise has been received that DG wishes to meet with our Cluster Clubs in the week of 16th to 20th September, at this stage it is proposed we would join with another club for a Lunch meeting either Monday 16th or Friday 20th at the Brisbane Club, This will be discussed with members accordingly.

I have asked Rotarian Anthony McKinnon to review the Social Activity of our club, this is to re-establish the works done previously by past member David Charlton, Mel Evans, Cam Bishop & Michael Kelly. Finally I request a nomination to take over the job of arranging of speakers for our club,

Yours in Rotary

**REMEMBER: ENGAGE ROTARY
CHANGE LIVES**

President Graeme

Rotary Meeting – 8 July 2013

The Chairman introduced our new P Graeme Whitmore. Graeme welcomed our single visitor Denise Schellbach from Brisbane Planetarium RC, who is a regular visitor to our Club. P Graeme then gave us a detailed account of some of his thoughts on where our Club should be going, and what had happened recently, and full details are given in his report published elsewhere in this Bulletin.

In Rotary spots Tony McKinnon told us of his new appointment as Convenor of Social Events. With his hat of Wine Sales Promoter he becomes the Club's Bacchus. He asked members to give him ideas as to what type of social events outside of normal Rotary events they would support. Older members will remember the successful Theatre nights, and other cultural outings organised by our former member David Charlton, so this could be a starting point. BBQs and informal gatherings at Golf Clubs and private homes have been well supported in the past.

Our speaker was our new member Dinah Zhang. Dinah is a lawyer who specialises in the law in relation to construction and building. She began her talk with a detailed lawyer's disclaimer of responsibility for any advice given or implied. A more detailed synopsis of her talk is published elsewhere in this Bulletin. Dinah's talk on a complex and specialised matter was well received by members, quite a few of whom must have been involved with building and construction projects in their professional careers. We all know, or know of, competent and honest building contractors who have been destroyed financially due to non or slow payment from principals. Dinah mentioned that most of the disputes she handled were settled before they went to court.

Continued next page...

ROTARY GRACE

O Lord and giver of all good
We thank You for our daily food
May Rotary friends and Rotary ways
Help us to serve You all our days.

Calendar

22 July 2013:
Fellowship

29 July 2013:
Job Talk

5 August 2013:
TBA

Roster

15 July 2013:

President G Whitmore
Chairman J Worrell
Set Up/Away K Watts
Raffle S Francis
Visitor Register G Holtmann
Attendance J Smerdon
T McKinnon

22 July 2013:

President G Whitmore
Chairman P Anderson
Set Up/Away C Shepherd
Raffle P Gresham
Visitor Register K Cocks
Attendance J Smerdon
J Charlton

29 July 2013:

President G Whitmore
Chairman R Tamaschke
Set Up/Away M Evans
Raffle P Little
Visitor Register M Winders
Attendance J Smerdon
T McKinnon

5 August 2013:

President G Whitmore
Chairman M Kelly
Set Up/Away A McKinnon
Raffle A Gillespie
Visitor Register S Francis
Attendance J Smerdon
J Charlton

Please forward any dates or articles of interest that you would like to see included in future Bulletins to the Bulletin Editor at

secretary@brisbanerotary.org.au



Dinah's talk demonstrated yet again the wealth of talent and expertise that exists in the combined experience of the members of our Club.

SAA Cam Bishop welcomed our visitor Denise Schellbach. He complained of saddle soreness after a full day on horseback on Saturday with his two young nieces. He told us of his new Belgian under and over 12 gauge Browning shotgun that he uses for skeet shooting. He got in his usual plug in for Sarabah Vineyard with the story of the prospective bride called Sarah who was only too happy to pay the booking fee for her wedding at the Vineyard because the venue had "Sara" in its name. Stan Francis won the raffle.

A total of only 17 members enjoyed the meeting. It would be a good show of support for P Graeme if we could get more members to attend regularly.

Job Talk – by Dinah Zhang

The construction industry, despite being deemed as a "specialist field" in the context of the legal industry as a whole, is actually quite broad and involves many participants.

Within construction, I work in litigation or what we call "the back end" as opposed to the front end of the matter. The difference between litigation in general and litigation in construction is simply that the matters I deal with are in the context of the construction industry.

The various issues that often arise in this industry include managing contractual and commercial risk but this would be the type of work in what they call the "front end". If the issues at the front end were resolved, this would largely assist with avoiding, or minimising disputes down the track or the "back end" of things but then I would be out of a job.

Our clients include a variety of industry participants from principals, developers, contractors, subcontractors, facilities managers, specialist consultants to Commonwealth government department and agencies, and home owners... or... really just anyone with deep pockets.

The construction group that I am part of actually delivers both front and back end services, including related issues like:

- tenders and project documentation;
- claims preparation and review
- security of payment advice and claims
- contract administration, risk management and strategic project planning
- Of course there's also a focus these days on alternative dispute resolution, so mediation and arbitration as opposed to litigation.

The primary focus of legal considerations for the construction industry is with the usually contract itself. Many construction contracts will include provisions concerning the means by which disputes arising under the contract are to be resolved including sequenced processes which if unsuccessful are followed by litigation, or... really just litigious preparation for us lawyers, as most matters settle outside of court.

My experience with front end work, that is the drafting of contracts in construction is rather limited. I am predominantly dealing with the litigation side of things, so in the case where the contracts are badly drafted (that is, if it is written by another law firm).

When this happens, essentially what I do is give advice in the event of a dispute, outline the available options and strategies in relation to moving forward and then (if necessary) run the matter in court. But like I said earlier, a great majority of actions that are commenced never reach a trial as they are usually concluded by settlement rather than by a decision of the court.

I also do a fair bit of work in relation to security of payment advice and claims which is predominantly governed by a piece of legislation called the *Building and Construction Industry Payments Act 2004* (in Queensland), more affectionately known to those in the industry as BCIPA.

This process works alongside the court system, but sits to the side for the most part.

In the interest of time, I might just give you a very very condensed description of the litigation process, and then quickly discuss the BCIPA process and how the 2 are linked.

Some of you may be familiar with the court process, but for the benefit of those who are not, in Australia, the courts operate on what is known as the "adversarial" system.

This means that the parties themselves instigate the proceedings and decide which issues of fact and law are to be decided by the court. The function of the court is then to determine the issues presented to it (not unlike a sports referee), on only the evidence submitted by the parties.

In this case, the strength of your case will depend upon the evidence that (following the rules and procedures of evidence) that you are allowed to lead in court, along with any legal submissions that your lawyers can make.

The standard of proof that is required in civil proceedings is what is known as "the balance of probabilities". I'm sure you have all watched various TV shows where in court proceedings they refer to another standard "beyond reasonable doubt" - that standard is reserved purely for the criminal jurisdiction.

For civil matters, the standard is the "balance of probabilities" or 51% really. In determining what did happen in the past a court decides on this balance of probabilities in that anything that is more probable than not, is treated as certain.

The first stage of the litigious process involves the definition of the issues in dispute. We do this through documents referred to as "pleadings" e.g. Claims and defence, NOITD, etc.



.As a general rule, a party cannot raise a matter at the trial unless it has been pleaded. The pleadings should be concise and state the material facts relied upon but not refer to the law or the evidence in support. Then you go through a process of what is called "discovery" or disclosure where you give the other side the evidence on which you are intending to rely upon.

And so this whole process goes on, often dragging out for years, narrowing the issues further, until a decision is made by the judge on the evidence before it. Of course, I'm really condensing and over-simplifying the process.

And this kind of procedure applies to any litigious matter leading to trial. For me, it will always be something related to the building and construction industry and involve matters ranging from... well an example of a matter which I'm currently involved in (and therefore cannot go into too much detail) is in regards to a claim of roughly \$40 million dollars for a breach of contract and misleading and deceptive conduct and a counterclaim in the vicinity of \$50 million (so roughly a \$90 million swing) – but one of the smallest matters I've been involved with... a \$70k claim for defective building of a domestic home, there were incorrect footings which subsequently led to subsidence of the home, so the back of the house was sloping and thereby caused all sorts of cracks in the wall.

The problem with going through the court system is that, if the matter does not settle, it may take several years for the matter to be eventually heard and by then you would have spent considerable dollars getting there and in the construction industry, this kind of delay in getting funds is never a good thing.

So when the BCIPA legislation came into effect in 2004, one of its stated objects was to ensure that persons who carry out construction work or supply related goods and services are entitled to receive progress payments in a timely manner.

The definition of construction work is very wide under the Act and also includes the definition of what is "building work" under the Queensland Building Services Authority Act 1991 Act. So it includes things like:

- construction, renovation, repair, demolition of building or structure;
- Construction of infrastructure (roads, power lines, sewers, railways);
- Installation of fittings (electrical, air-conditioning, drainage, fire protection, security systems) to a building or structure;
- Cleaning of buildings or structures;
- Preparatory work (so excavating, foundations, erecting scaffolding, prefabrication of components, landscaping);
- and even includes Painting of a building or structure.

Just about almost everything.. The only exclusion would be the actual extraction of minerals, such as in the case of mining contracts. (But still includes everything leading up to that extraction... very broad).

It also includes the supply of goods and services in connection with the list of things I have just mentioned. So that would include:

- Materials and components forming part of building or structure;
- Plant or materials (sold or hired) for use in the work;
- Labour hire; and
- Consultants services (architects, design, QS, soil testing, engineers).

How does this piece of legislation ensure that people who carry out these construction works receive their funds (or payment of their work) in a timely manner?

Well it creates a statutory right to make payment claims and to receive payment for it. So, say a builder/ contractor puts in its payment claim, the respondent, that is a contractor in relation to a subcontractor, or a principal in relation to a contractor,

must either make the payment in full (if they agree with the claim) or respond with a payment schedule outlining its reasons for non-payment or payment of a lesser amount within a 10 business day period.

If there is a discrepancy between the amount of the payment claim and the amount in the payment schedule (\$10, nil/\$2), the claimant may refer the claim to adjudication, to what is known as an authorised nominating authority (ANA) such as RICS (ever heard of them?) (the Royal Institution of Chartered Surveyors) or IAMA (the Institute of Arbitrators and Mediators Australia). These are some of the more well-known or widely used ANAs in the industry.

The appointed adjudicator will exercise independent judgement, and decide the amount of the progress payment, the due date, the rate of interest that is to be applied for non-payment. In doing so, the adjudicator will have considered the Act, the contract, the claims, the schedules and any submissions made by the parties.

The decision of the adjudicator is final, and is subject only to jurisdictional errors such as if a party was not afforded natural justice in some way. The respondent must then within 5 business days of receiving the decision pay the amount that is determined.

The Act also preserves the contractual rights, so as an aside you, as a claimant, could also pursue a contractual claim in the courts, or a common law action such as negligence.

But like I said earlier, the Act allows a fast-track method of getting the funds as it requires a payment schedule to be lodged within 10 business days of the claim, but then if the claimant wants to go to adjudication (that will be another 10 business days).



An adjudication response from the opposing side must be lodged within 5 business days and a decision made by the adjudicator in another 10 business days. (Of course, there will be certain circumstances where the adjudicator can request extensions).

As you can imagine, the timeframe outlined in this legislation is a major contributing factor as to why there are certain periods where a group of us has to stay in the office until midnight to make a deadline (you know, in cases where you are for example a respondent and the claimant has been preparing, what we refer to as an "ambush claim" – in that say it's January right now, and the claimant lodges its payment claim and receives a payment schedule, in response for an amount of say... \$nil or any amount less than what it has claimed, then the same for February (but this February claim will include a further claim for works completed during that month) and on it goes, perhaps even until 6 or... even 12 months later and THEN the claimant decides to hit the respondent with a massive claim with an adjudication application for a few million dollars, all the while having had 6 or 12 months or however long it was able to wait out for, to prepare its claim, and having had the benefit of being able to see what the reasons for rejecting payment from the respondent were and the months of preparing boxes and boxes of lever-arch folders of material and evidence to support its claim at adjudication.

And... the respondent has a whole 5 business days under the legislation to respond!!

You would hate to be in the respondent's shoes at that point in time. And importantly, the response cannot include issues not raised in those earlier payment schedules in response to those monthly payment claims I mentioned earlier, so it's best to deal with the claims strategically as they come in. The payment schedules MUST be issued in the correct form and within the required time and include all reasons for withholding payment.

The legislation is set up in a way that if no payment schedule or adjudication response is received, the claimant can apply for judgment. So they can file the adjudication certificate as a judgment for a debt (which is then enforceable through the courts). So as a respondent, you can see how there is a huge administrative burden in responding to numerous payment claims within the strict periods prescribed by the Act.

What's even more interesting is that the respondent cannot challenge the adjudicator's decision in proceedings to have judgment set aside and past adjudicators are bound by the decisions of previous adjudicators if the claim is in relation to the same work.

Another common difficulty for a respondent is if they receive numerous subcontractor payment claims on the same day from the various subcontractors that work for them. This point is one of the key strategic points for a claimant. So even though the respondent does not need to respond to repeated claims, it really needs to ensure that the date of the claim received is religiously and accurately recorded.

So the reason why BCIPA claims are so enticing is that it allows claims for interim payments on account.

As the Act does not affect civil proceedings, you could of course have a concurrent claim under the Act and an ongoing litigation and the adjudicator's decision will not be binding on a judge.

And it is possible even to commence separate proceedings to prove a party's final entitlement to a payment claim. But from a contractor's perspective, you can see why the 40 day process to get your money is much more attractive than potentially years in the court system. By that time, will the money still be there??

So this Act is an opportunity for contractors and subcontractors to claim payment under the Act without the need to resort to costly and time consuming disputes. But litigation is still there as an alternative.