



REFERENCE DATES: WHAT NOT TO DO

AUTHOR // MELANIE MCGUIRE

Reference dates in construction contracts are vital to the operation of the *Building and Construction Industry Payments Act 2004* (Qld) (“**BCIPA**”). A party’s right to a progress payment (and to also make a payment claim) under BCIPA is dependent upon the claimant establishing that a reference date exists under the construction contract. This will be:

- a specific date provided for in, or worked out under, the construction contract (ie 28th day of each month); or
- where a construction contract does not provide for a reference date, then the last day of the named month in which the construction work was first carried out and the last day of each later named month.

From each reference date that is established under the construction contract, a person is entitled to a progress payment, specifically where they have undertaken to carry out construction work (or supply related goods and services) under that contract. A payment claim can be issued by a party who is entitled to a progress payment. However, to be a valid payment claim, it must:

1. identify the construction work or related goods and services to which the progress payment relates;
2. state the amount of the progress payment that the claimant claims to be payable (“**Claimed Amounts**”); and
3. state that it is made under BCIPA.

A claimant cannot serve more than one payment claim for each reference date under the construction contract and as such, the importance of clearly established reference dates cannot be overstated.

CONDITIONAL CLAUSES

BUT... what happens if a reference date arising under a construction contract is conditional upon a party performing a certain act before that reference date is enlivened? Would a conditional clause like this be valid?

The short answer is **no** but there appear to be some circumstances in which a conditional clause may be acceptable.

The provisions of BCIPA have effect despite any provision to the contrary in any contract, agreement or arrangement (ie a party cannot contract out of BCIPA (see section 99 of the Act)). Further, a provision of a construction contract will be void to the extent to which it:

1. is contrary to BCIPA;
2. purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of BCIPA; or
3. may reasonably be construed as an attempt to deter a person from taking action under BCIPA.

The inclusion of conditional clauses can be construed as an attempt by a party to contract out of BCIPA, as was

the case in a 2014 Queensland decision of *Lean Field Development Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor* [2014] QSC 293.

In that case, a clause in the construction contract required that a draft payment claim be issued by E & I Global Solutions (“EIGS”) before a proper payment claim could be issued under BCIPA. Problems arose when a draft payment claim was not issued by EIGS before a final payment claim was served. In response to an adjudication application, Lean Fields argued that a reference date had not arisen because a valid payment claim had not been issued (as a draft payment claim was never provided to Lean Fields). The relevant clauses in this construction contract ultimately sought to inhibit the operation of BCIPA.

The clauses were held to be invalid because the requirement to issue a draft payment claim on a particular date had no significant utility in terms of facilitating the payment of a progress payment to which EIGS would otherwise have had a statutory entitlement. The clauses were void to the extent that they conditioned a “reference date” and were considered an unnecessary and impermissible constraint on the right to claim for payment under BCIPA.

With respect to conditional clauses, the judge in the *Lean Fields* case noted, relevantly, that not every provision which imposes a condition on a reference date arising could be said to be contrary to BCIPA and therefore void. There is nothing explicitly in the statutory definition of “reference date” which prevents parties from agreeing that a reference date will arise when a party does something (eg the completion by the contractor of a defined part of the work).

MOST RECENTLY...

In July 2015, the Queensland Supreme Court handed down its decision in *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QCS 218. The construction contract in that case included a clause which required the claimant to provide the respondent with a statutory declaration attesting to full payment of all subcontractors at least two working days prior to issuing a payment claim. While a statutory declaration was issued here, it did not state *that full payment of all subcontractors had been made*.

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at www.clarkekann.com.au. To update your contact details or unsubscribe to any of our publications, email us at ck@clarkekann.com.au.

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation.

[Privacy Policy](#)

It was BRB Modular’s contention that a valid reference did not arise because the clause was not strictly complied with and therefore the payment claim issued by AWX Constructions was invalid. The claimant was otherwise entitled to make a progress claim on the 28th day of each month.

The clause here was also held to be invalid to the extent that it affected the party’s rights and liabilities under BCIPA and the payment claim was upheld. The clause was invalid because it excluded what would otherwise have been a statutory entitlement for AWX Constructions to make a payment claim under BCIPA.

SUMMARY

Reference dates in construction contracts should be clearly stated or easily “worked out” by the terms of the contract. If you are considering including a reference date that is conditional upon an act being performed or an event occurring, then you should be mindful of whether the clause you are proposing:

- impedes rather than furthers the objects of BCIPA;
- has any utility;
- is unduly onerous and whether the consequences of non-compliance are disproportionate and extreme.

We recommend you seek independent legal advice if you are considering the inclusion of a conditional clause like this in your construction contract as it could mean the difference between making a successful or unsuccessful payment claim.

A clear or easily “worked out” reference date could also save you a lot of money.

FOR MORE INFORMATION, PLEASE CONTACT:



MELANIE MCGUIRE //
Lawyer

T 61 7 3001 9289

E m.mcguire@clarkekann.com.au