



## Timing of payment claims – “on” or “from” the Reference Date?

By Luke Preston, Special Counsel

Two recent decisions in the Supreme Court of Queensland provide guidance as to the time for submitting payment claims and the formal requirements of payment schedules under the Building and Construction Industry Payments Act 2004 (Qld) (the Act).

### Reference Dates

In *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd*,<sup>1</sup> His Honour Justice Fryberg declined to follow an approach adopted only two months earlier in *Reed Constructions (Qld) Pty Ltd v Martinek Holdings Pty Ltd*.<sup>2</sup>

Section 12 of the Act provides that a party is entitled to a progress payment *from* each reference date, whilst section 17(5) limits the claimant to serving one payment claim in relation to each reference date.

In *Reed*, Justice Daubney had taken the view that a contractual provision requiring progress claims to be submitted on a particular day of the month was not overridden by the Act. As a result, His Honour held that a payment claim could be made only *on* the day of the month stipulated by that contract.<sup>3</sup>

In *Tenix*, however, Justice Fryberg expressly rejected any such interpretation of the Act.

His Honour there considered that s 12 “suggest[s] the existence of an entitlement [to a progress payment] on and after each [reference] date” and, importantly, that:

*There is no inconsistency [between section 17(5) and] the view that a claim may be made at any time on and after the entitlement arises under s 12... [Section 17(5)] simply provide[s] a limitation on the number of claims that can be made in respect of the one reference date.*

### Payment Schedules

The approach taken in *Tenix* was endorsed in the subsequent decision of *Gisley Investments Pty Ltd v Williams & Anor*<sup>4</sup> which considered the formal requirements of payment schedules under s 18 of the Act.

In *Gisley* the applicant relied upon, as its payment schedule, an ‘informal’ email providing relevantly “Whilst the job continues to remain unfinished, final payment is not yet owed.”

Justice Douglas concluded that the email did sufficiently comprise a statement that no payment was proposed to be made, and was therefore valid as a payment schedule.<sup>5</sup>

*The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule... from an unduly critical viewpoint. No particular form is required.*

### Implications for the Industry

Of the conflicting approaches seen recently in the Supreme Court, the writer considers that the interpretation adopted by Justice Fryberg in *Tenix* is likely to be preferred in the future (such that a claim may be made *from* a reference date, rather than only *on* a reference date). Nonetheless, until the issue has been finally resolved, careful contractors might ensure that claims are submitted on any reference date which is expressly prescribed by their contract.

Similarly, while courts have readily taken a broad approach in assessing the validity of payment schedules, prudent contracting parties will always comply strictly with the express requirements set out in s 18 of the Act.

<sup>1</sup> [2010] QSC 7, Fryberg J., 12 January 2010.

<sup>2</sup> [2009] QSC 345, Daubney J., 4 November 2009.

<sup>3</sup> *Ibid* at [25].

<sup>4</sup> [2010] QSC 178, Douglas J., 26 May 2010.

<sup>5</sup> Endorsing the comments of Chesterman J. in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors* [2007] QSC 333.

## Court of Appeal permits Identical Payment Claims

By David Rodighiero, Partner and John Grant, Special Counsel

The construction industry in Queensland had until recently understood that the *Building and Construction Industry Payments Act 2004* (Qld) (the Act) prevents a claimant from re-submitting a payment claim in terms identical to an unsatisfied previous payment claim.

That position was reflected in the 2008 decision of *Doolan v Rubikcon (Qld) Pty Ltd*,<sup>1</sup> where Justice Fryberg held that the word "included" in s 17(6) of the Act does permit the inclusion of previous payment claim amounts as part of a broader subsequent payment claim, but will not allow the re-agitation of an entirely identical payment claim.



The 2010 decision of *Spankie & Others v James Trowse Constructions Pty Limited & Others*<sup>2</sup> saw, however, Justice Lyons reject that view. His Honour there determined that (consistent with the Act's stated purpose of providing for progress payments) the natural reading of s 17 does allow a payment claim to be made for only an amount that has been the subject of a previous claim.

An appeal from that decision was determined in *Spankie and Ors v James Trowse Constructions Pty Ltd*<sup>3</sup> where the Queensland Court of Appeal endorsed the reasoning of Justice Lyons at first instance and expressly declined to follow the alternative reasoning which had been adopted in *Doolan*.

Delivering the Court of Appeal's leading judgment in dismissing the appeal, Fraser JA considered that the text of s 12 of the Act is certainly broad enough to encompass an entitlement to a progress payment of an unpaid amount for work done before a previous reference date, and stated that:

*When s 17(6) is read in the context of the preceding provisions, as it should be, its effect is merely to ensure that no implication may be drawn that s 17(5) precludes a claimant from making a payment claim for an unpaid amount claimed in a previous claim.*

Fraser JA considered that the Act creates no necessary relationship between the reference date upon which a claim is made and the time when the work the subject of the claim was carried out. The use of the word "included" in s 17(6) is insufficient to restrict the general entitlement to progress claims created by ss 12 and 17.

His Honour did however acknowledge,<sup>4</sup> consistent with the New South Wales authority of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*,<sup>5</sup> that the re-agitation of a payment claim will not be permissible where a previous payment claim for the same subject matter has been the subject of a valid adjudication determination.

### Implications for the Industry

Respondents must be mindful of the rights of contractors to re-submit identical payment claims where a previous claim has not been determined by valid adjudication. Care must be taken to ensure a comprehensive response to each payment claim by way of payment schedule, so as to avoid the risk of automatic liability for the full claimed amount under s 18 and an application for judgment by the claimant.

1 [2008] 2 Qd. R 117.

2 [2010] QSC 336.

3 [2010] QCA 355.

4 Ibid at [25].

5 [2008] NSWSC 749.

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