

Construction Alert

Queensland Court of Appeal confirms narrow view of the 'mining exclusion' in Security of Payment legislation but not unanimous over what is 'construction work'

November 2012

Introduction

The mining and resources industry is reported to contribute \$81 billion to the Queensland economy each year which represents one in every five dollars towards Queensland's Gross State Product. It is clear that monies payable for works and services performed in the mining industry (and the speed of payment thereof) is of significant importance to Queensland. To date, there has been very little guidance from the Courts in Queensland as to the extent that the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**) applies to the mining and resources industries. The BCIP Act introduces a rapid adjudication process and is primarily aimed at securing cash flow for contractors.

In the recent decision of *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor* [2012] QCA 276 the Queensland Court of Appeal (being the highest Court in Australia to consider the application of Security of Payment legislation to the mining industry) did clarify the scope of the BCIP Act and:

a. confirmed the narrow interpretation of the mining exclusion contained in the BCIP Act;

- b. provided guidance, albeit not unanimous, on what should be considered 'construction work' under the BCIP Act in relation to the mining industry;
- c. held that where a contract contains obligations to perform both 'construction work' and 'non-construction work', the contract as a whole is a 'construction contract' for the purposes of making a payment claim under the BCIP Act; and
- d. held that a mistake from an adjudicator in relation to determining the extent to which a payment claim is made for 'construction work' or 'non-construction work' is not a jurisdictional error that gives rise to a ground for review of any adjudication determination.

Narrow interpretation of the mining exclusion

The exclusions for mining activities that set out types of work that are not caught by the BCIP Act include:

- a. "the drilling for, or extraction of, oil or natural gas;" and
- b. "the extraction, whether by underground or surface

working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose."

The Queensland Court of Appeal was unanimous in its decision in relation to the narrow interpretation of the second mining exclusion above. As it currently stands, unless the work undertaken is physically 'extracting' the mineral, the exclusion contained in section 10(3) of the BCIP Act will not apply.

The effect of this narrow interpretation is that the rights of a claimant under the BCIP Act will attach themselves to many of the tasks undertaken in the mining industry. In short, if the work undertaken is within the expansive definition of 'construction work' under the BCIP Act and is not actually drilling or extracting oil or gas or extracting minerals, the BCIP Act will apply.

What is construction work?

Although the Court was unanimous on the interpretation of the mining exclusion, the Court was split on what works fell within the definition of 'construction work'.

The Court considered whether the following work fell within the definition of 'construction work':

- a. constructing dams and drains;
- b. clearing and grubbing land;
- c. stripping and hauling top-soil to a stockpile for later rehabilitation; and
- d. clearing overburden by trimming and scaling batters and walls, clearing the excavated material, assisting bulldozers to remove the excavated material and cleaning the interface between the overburden and coal seam.

In relation to point (a) above, the Court unanimously found that constructing dams and drains fell within the definition of 'construction work'.

However, as to the balance of the work, the Court was divided. Justices Holmes and White held that the works referred to in points (b) to (d) above were not within the definition of 'construction work' (in doing so, disagreeing with the primary judge, Justice Fryberg, with respect to the works identified in points (b) and (c) and agreeing with Justice Fryberg with respect to the works identified in point (d) only). Justices Holmes and White found that those works were neither works forming part of the land nor an integral part of, or preparatory to or for completing other work falling within the definition of 'construction work'.

On the other hand, Justice Phillippides held that all of the work identified in points (b) to (d) above was 'construction work'.

In light of the divided opinion of the Court, it can be said that the present state of the law is such that constructing dams and drains is 'construction work', whilst clearing and grubbing land, stripping and hauling top-soil and clearing overburden is not so, for the purposes of the BCIP Act.

What happens when a contract includes both 'construction work' and 'non-construction work'?

Thiess submitted to the Court that as the contracts with Warren Brothers included work that was not within the definition of 'construction work', Warren Brothers were prevented from utilising the BCIP Act.

The Court unanimously held that a 'construction contract' for the purposes of the BCIP Act only requires an item of 'construction work' to attract the BCIP Act. The Court held that:

'a contract or arrangement is a construction contract if it contains an undertaking of the type specified in the definition of construction contract, notwithstanding that it contains other undertakings or imposes other obligations not within the definition.'

Therefore, if a contract contains an undertaking to perform some 'construction work', the contract is a 'construction contract' for the purposes of the BCIP Act and a claimant is entitled to make a payment claim pursuant to that contract.

On that basis, as:

- a. the subcontract in question included the construction of dams and drains which constituted 'construction work'; and
- b. the two hire contracts in question involved an undertaking to supply 'related good and services' for use in connection with the carrying out of 'construction work' (namely, for constructing dams and drains),

each of the three contracts were held to be 'construction contracts' for the purposes of the BCIP Act.

What happens if an adjudicator allows a claim for payment in relation to 'non-construction' work?

Thiess submitted to the Court that the adjudicator's decision included amounts that were not in relation to 'construction work' or 'related goods and services' and included 'non-construction work', and therefore the adjudicator acted without jurisdiction and the adjudication decisions were invalid.

The Court unanimously held that an adjudicator does not exceed its jurisdiction by determining on the material provided to it in accordance with the BCIP Act, the extent to which a payment claim is made for construction work or related goods and services.

Whilst an adjudicator should not award monies claimed for 'non-construction work' included within a payment claim in an adjudication, the practical implications of the Court's findings are that where a construction contract contains both 'construction work' and 'non-construction work' and a claimant makes a claim for 'non-construction work' under the BCIP Act, if the adjudicator incorrectly allows the claimant's claim for the 'non-construction work', the respondent is prevented from reviewing the adjudicator's decision on that basis.

In a mining context, the amounts claimed by a claimant (for example for clearing and grubbing, stripping topsoil or removing overburden) can be significant and a mistake in favour of the claimant will require a respondent to pay those amounts in accordance with the adjudication decision. The only recourse the respondent will have is to commence costly and lengthy proceedings to recover the amount pursuant to section 100 of the BCIP Act.

Summary and implications

Gratefully, the Court of Appeal's decision has provided some clarification as to the application of the BCIP Act and, in particular section 10(3) of that Act, to the mining and resources industries.

In that regard, it is clear that if work undertaken is within the expansive definition of 'construction work' under the BCIP Act and is not actually extracting a mineral, the BCIP Act will apply. As to whether the following activities associated with mining fall within that expansive definition of 'construction work', it is the majority's view that:

- a. the construction of dams and drains does; and
- b. clearing and grubbing land, stripping and hauling top-soil and clearing overburden does not.

It is also clear that respondents must be cautious. If a contract includes only a small portion of 'construction work' the contract will constitute a 'construction contract', and if a payment claim is submitted pursuant to such a contract under the BCIP Act that claims monies for 'non-construction work', an adjudicator's decision cannot be reviewed if the adjudicator awards those monies. A respondent must therefore clearly identify the portions of a payment claim that relate to 'non-construction work' so that an adjudicator is able to discretely consider those portions and is readily able to excise the amounts claimed for those works.

As for claimants, they are in an enviable position of being able to include all of the 'construction work' as well as the 'non-construction work' carried out under a 'construction contract' in payment claims submitted under the BCIP Act. They can then leave it for the respondent to present sufficient factual material to allow an adjudicator to excise the amounts claimed for 'non-construction work'. Claimants can also take comfort in knowing that if an adjudicator fails to excise amounts claimed for 'non-construction work' and awards those amounts to the claimant, a respondent will not be able to review the adjudicator's decision for the adjudicator's failure in that regard. Further, the narrow interpretation of the mining exclusion means that a whole range of mining activities other than the precise extraction of the mineral, oil or gas will fall within the scope of the BCIP Act and allow contractors to agitate claims quickly and cheaply through the fast-track adjudication process.

Written by:

Andrew Kelly

Partner

+61 7 3338 7550

akelly@thomsonslawyers.com.au

Laurie Malone

Associate

+61 7 3338 7537

lmalone@thomsonslawyers.com.au

For further information, please [click here](#) to contact our national Construction team.