

## Construction Alert

# Security of Payment Act not applying to construction work on mining leases

July 2013

### Introduction

The recent decision of Wilson J in *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 in the Queensland Supreme Court held that building and construction companies carrying out construction work on mining leases may not be entitled to rely on the *Building and Construction Industry Payments Act 2004 (Qld)* (**BCIP Act**).

### Facts

The land on which the Skardon River mine on Cape York, Queensland is located is subject to two mining leases issued under the *Mineral Resources Act 1989 (Qld)*. In August 2011 and October 2012, Agripower Australia Ltd (**Agripower**) purchased plant from the Skardon River mine including mixing tanks, storage bins, baghouses and a kiln. In June 2012, Agripower entered into a contract with J & D Rigging Pty Ltd (**J & D Rigging**) for the dismantling, removal and transportation of this plant from the Skardon River mine.

In November 2012, J & D Rigging served a payment claim pursuant to the BCIP Act on Agripower which resulted in an adjudication application and adjudication decision in favour of J & D Rigging for slightly over \$2.5 million.

In March 2013, Agripower commenced proceedings in the Supreme Court of Queensland seeking a declaration that the adjudication decision under the BCIP Act was

void. Agripower contended that it was not obliged to pay any amount as, amongst other reasons, the work performed was not 'construction work' within the meaning of section 10 of the BCIP Act because the mining plant which was dismantled did not form part of the land.

### 'Construction Work'

To make a valid payment claim pursuant to section 17 of the BCIP Act, it must be primarily in relation to construction work under a construction contract.

Section 10 of the BCIP Act defines 'construction work' as (amongst other things):

*'(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form part of land;*

*(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbour railways, inland waterways, pipelines, reservoirs, water mains, wells sewers, industrial plant and installations for land drainage or coast protection.'*

Accordingly, to perform 'construction work' for the purposes of the BCIP Act, it must be 'forming, or to form part of land.'

J & D Rigging contended that the plant was physically connected to the land, and accordingly, dismantling the plant was construction work. Agripower, however, submitted that the objective intention of the plant meant that it was 'personal property' which did not form part of the land and accordingly, dismantling the plant was not construction work within the meaning of the BCIP Act.

## Decision

Wilson J considered that the test for determining whether or not plant forms 'part of the land' involves a consideration of the objective intention with which the plant was placed on the land.

The objective intent with which the plant was placed at Skardon River mine was pursuant to the *Mineral Resources Act*. This act provides a statutory scheme in which the relevant minister grants mining leases which entitle the leaseholder to remove minerals and carry out associated mining activities on land.

Relevantly, the *Mineral Resources Act* explicitly does not create an interest in the land for the leaseholder, and also requires holders of mining leases to remove any building, structure, equipment or plant from the land prior to the termination of the mining lease.

On this basis, her Honour considered that insofar as the mining plant was physically attached to the land it was to stabilise it and allow for the efficient operation of the mining lease and did not provide an additional feature to the land. As the plant was required to be removed by the *Mineral Resources Act* it did not form a 'fixture' to and was therefore not a 'part of the land'.

Whilst the mining plant may have formed part of the mining lease and was physically located on the land, the Queensland Supreme Court held that these various items of plant did not form part of the land, and accordingly the contract between Agripower and J & D Rigging was not for the performance of 'construction work' within the

meaning of section 10 of the BCIP Act. On this basis, the adjudication decision was declared void.

## Implications

This decision sets a significant precedent for the mining and construction industry as it narrows the definition of 'construction work' and will operate to invalidate a payment claim insofar as it is issued with respect to a contract for construction work on a mining lease under the *Mineral Resources Act*. The decision, by analogy, could also be applied to work performed under the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*. This decision may be applicable to similar mining leasehold legislation in other states.

Builders, construction companies and operators on leaseholds under the *Mineral Resources Act* are encouraged to urgently review and reconsider the applicability of the BCIP Act to their contractual arrangements.

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## Team Update

We would like to update you on a number of recent changes that have taken place within the Construction team at Thomsons Lawyers, Brisbane.

Our focus is very much about recognising and rewarding the pool of talent we have within the firm and these appointments reinforce our commitment to sustainable organic growth. Below is a short summary of the skills and experience these lawyers bring to our clients.

**Andrew Kelly**  
Partner

## Special Counsel



**Jacques Nel**

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Jacques advises clients in both contentious and non-contentious construction matters. He has represented individuals, contractors, subcontractors, principals and government owned corporations in a range of complex construction disputes in New South Wales and Queensland.

Jacques has a specific interest in Adjudications and is a registered Adjudicator in Queensland and New South Wales. He also has extensive experience in the preparation of claims and responses under the Security of Payment legislation in New South Wales, Queensland and Victoria and has represented clients in the Supreme Courts of New South Wales and Queensland in proceedings brought under the relevant Security of Payments legislation.

## Senior Associates



**Pip McGrath**

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Pip has extensive experience in contentious construction matters and has been involved in a range of complex disputes in both Queensland and New South Wales. Pip has acted for a variety of clients across those matters, including government owned corporations, principals, contractors and subcontractors.

Pip also has significant experience in adjudications under the *Building and Construction Industry Payments Act 2004 (Qld)* and has acted for both principals and contractors in the adjudication process.



**Laurie Malone**

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Laurie has extensive experience in acting for clients on building and construction related disputes. Laurie specialises in the various Australian security of payment acts. In advising his clients, Laurie applies his considerable knowledge of the building, construction and mining sectors, having worked throughout Queensland as a bulldozer, scraper and excavator operator.

By combining his legal and practical skill set Laurie is able to quickly understand the factual background to any dispute and ensure an appropriate strategy is implemented to ensure the best result for the client.

## Associates



**Ben Christoffel**

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Ben specialises in front-end transactional construction work and back-end dispute resolution with a focus on major infrastructure projects, commercial construction, Liquefied Natural Gas, and port development. The front-end component of Ben's practice includes preparing, reviewing and negotiating construction related contracts for a number of construction delivery methods. The back-end component includes providing commercial and practical advice on construction and engineering disputes as well as all other forms of dispute resolution.

Ben's experience includes working with mining companies, airports and seaports, on projects such as processing plants, high-rise constructions and other major infrastructure projects.



**Christopher Beem**

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Christopher has a number of years experience advising on building matters, predominantly in litigation. Christopher has also been involved in a number of significant adjudication disputes (acting for both claimants and respondents) pursuant to the *Building and Construction Industry Payments Act 2004 (Qld)*.

Christopher has a strong knowledge of the law surrounding defective works and their rectification and has acted as instructing solicitor on a multitude of matters in various jurisdictions.

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

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