

## Does your payment claim have to be accompanied by a statutory declaration?

A common clause in construction contracts requires a contractor submitting a progress claim to also submit a statutory declaration in a specific form confirming that its subcontractors have been fully paid. A recent Queensland Supreme Court ruling\* held this clause void in circumstances where it is a precondition to being able to submit a progress claim because it is inconsistent with the provisions of the *Building and Construction Industry Payments Act* (BCIPA).

BRB Modular Pty Ltd (**BRB**) and AWX Constructions Pty Ltd (**AWX**) entered into a contract by which AWX was to construct a camp and accommodation village at an LNG processing facility.

A dispute arose around a contract provision that required AWX to submit to BRB a statutory declaration, 2 days prior to the submission of a progress claim, declaring that it had paid all moneys due and payable to its subcontractors. AWX did sign a statutory declaration but amended the wording of the declaration and included the words “*other than those owed variations, payable by the head contractor.*”

BRB held that the progress claim was void because it was not made from a valid reference date because in order to have been made from a valid reference date it had to be preceded by the necessary statutory declaration.

AWX referred the payment claim to an adjudicator, who determined that the requirement for a statutory declaration was void because of section 99 of the *Building and Construction Industry Payments Act 2004* (Qld) (the **Act**), which prevents parties from relying on contractual provisions that have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of the Act.

BRB appealed the decision to the Supreme Court of Queensland which held:

1. the Act provides a speedy means of ensuring cash-flow to a party from the party with which it contracts;
2. the Act confers an entitlement upon a party to a construction contract who qualifies for that entitlement. The Act does not give any entitlement to third parties to be paid out of a progress payment, or for the progress payment to be secured for their benefit;
3. third parties are not the primary beneficiaries of the Act's provisions, and the act does not purport to regulate relations between a contractor and third parties; and
4. the Act does not require a contractor to prove that all of its sub-contractors have been paid. Such a requirement might be said to undermine the Act's purpose of ensuring cash-flow to a party from the party with whom it contracts.

Contractors, subcontractors and principals involved in construction projects in Queensland should consider the impact of this decision on the validity of similar terms in their own contracts.

Organisations that contract out construction work should review their standard terms and conditions to ensure that they do not contain provisions that may be declared void. Contractors performing work on the other hand should make themselves aware of the conditions that have been imposed on them that could potentially be rendered void.

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Please contact the Clifford Gouldson Construction Team if you need a review of your contract terms or have questions on how this decision may affect your business.

*\*BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors [2015] QSC 218*

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For more information contact our [Construction Law Team](#).

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